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PROFESSIONAL CONDUCT — THE COURVOISIER CASE.

THE question is often mooted how far a lawyer is justified in defending a client whom he knows to be guilty, — and the most plausible charges of the enemies of our profession, are those which assume that all its members are mercenary — that their services may at any time be secured by those who can afford to pay for them. Now it ill comports with the dignity of such a profession to stoop for a moment to consider such charges. Our impression is that the cases in which an advocate has any better assurances of the guilt of his client, than are open to the public, are very few in number. On the contrary, as a lawyer's duty is to give to his client the benefit of the law and evidence properly admissible in the case, we are at a loss to understand how there should exist any anxiety on his part to discover, or on that of his client to disclose, any unpublished facts which might confirm a presumption of guilt.

We cannot, however, consent to discuss, at present, the duty of an advocate under such circumstances. Our attention has recently been called to an English case, which is very much in point. Our readers undoubtedly remember the case of *Courvoisier*, indicted nine years since, for the murder of his master, Lord William Russell. He was defended by Mr. Charles

Phillips, assisted by Mr. Clarkson. Since the trial, Mr. Phillips has been charged, on both sides of the water, with gross moral delinquency in the conduct of the case. It has been asserted in respectable journals and by credible persons, that he not only knew by actual confession that his client was guilty of the charge, but that so knowing, he endeavored to secure his acquittal by throwing the charge upon innocent parties, and by interposing the whole weight of his personal character. Mr. Phillips has quietly permitted these charges to be advanced, and has thought that all for whose good opinion he was anxious, would at once reject them. After an interval of nine years, this stale calumny has again been revived in the *Examiner* newspaper; and this has seemed to call for some reply. Mr. Phillips, we are glad to say, has completely vindicated himself. The London Times, of the 20th Nov., contains a correspondence between Mr. Phillips and Mr. Samuel Warren, who is well known in the United States, by which it appears that the former gentleman was made acquainted with his client's true position at too late a period to justify his withdrawal; — that his course was approved of, if not suggested, by one of the most distinguished judges in England; — and that, so far from interposing his personal influence, and endeavoring to divert the opinion of the jury against innocent persons, he displayed the most rigid conscientiousness in his conduct of the case, and only endeavored to secure for his client that careful and impartial investigation of his case to which, by the laws of his country, he was most unquestionably entitled. We are glad to be able to publish the correspondence at length:

INNER TEMPLE, Nov. 14, 1849.

My dear Phillips, — It was with pain that I heard yesterday of an accusation having been revived against you in the *Examiner* newspaper respecting alleged dishonorable and most unconscientious conduct on your part when defending Courvoisier against the charge of having murdered Lord William Russell. Considering that you fill a responsible judicial office, and have to leave behind you a name unsullied by any blot or stain, I think you ought to lose no time in offering, as I believe you can truly do, a public and peremptory contradiction to the allegations in question. The mere circumstance of your having been twice promoted to judicial office by two Lord Chancellors, Lord Lyndhurst and Lord Brougham, since the circulation of the reports to which I am alluding, and after those reports had been called to the attention of at least one of those noble and learned lords, is sufficient evidence of the groundlessness of such reports.

Some time ago I was dining with Lord Denman, when I mentioned to him the report in question. His lordship immediately stated that he had inquired into the matter, and found the charge to be utterly unfounded; that he had spoken on the subject to Mr. Baron Parke, who had sat on the bench beside Chief Justice Tindal, who tried Courvoiser, and that Baron Parke told him he had, for reasons of his own, most carefully watched every word that you uttered, and assured Lord Denman that your address was perfectly unexceptionable, and that you made no such statements as were subsequently attributed to you.

Lord Denman told me that I was at liberty to mention this fact to any one; and expressed in noble and generous terms his concern at the existence of such serious and unfounded imputations upon your character and honor.

Both Lord Denman and Baron Parke are men of as nice a sense of honor and as high a degree of conscientiousness as it is possible to conceive; and I think the testimony of two such distinguished judges ought to be publicly known, to extinguish every kind of suspicion on the subject.

I write this letter to you spontaneously, and, hoping that you will forgive the earnestness with which I entreat you to act upon my suggestion,

Believe me, ever yours sincerely,

SAMUEL WARREN.

Mr. Commissioner Phillips.

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39 GORDON-SQUARE, Nov. 20.

My dear Warren,—Your truly kind letter induces me to break the contemptuous silence with which for nine years I have treated the calumnies to which you allude. I am the more induced to this by the representations of some valued friends that many honorable minds begin to believe the slander because of its repetition without receiving a contradiction. It is with disgust and disdain, however, that even thus solicited I stoop to notice inventions too abominable, I had hoped, for an honest man to have believed. The conduct of Lord Denman is in every respect characteristic of his noble nature. Too just to condemn without proof, he investigates the facts, and defends the innocent. His deliberate opinion is valuable indeed, because proceeding from one who is invaluable himself. My judicial appointments by the noblemen you mention would have entailed on them a fearful responsibility, had there been any truth in the accusations, of which they must have been cognizant. I had no interest whatever with either of these chancellors, save that derived from their knowledge of my character, and their observations of my conduct. It is now five and twenty years since Lord Lyndhurst, when I had no friend here, voluntarily tendered me his favor and his influence, and his kindness to me remains to this day unabated. Of Lord Brougham, my ever warm and devoted friend, I forbear to speak, because words cannot express my affection or my gratitude. His friendship has soothed some affliction and enhanced every pleasure, and while memory lasts will remain the proudest of its recollections and the most precious of its treasures. This is no vaing'orious vaunting. The unabated kindness of three of the greatest men who ever adorned the

bench ought, in itself, to be a sufficient answer to my traducers. Such men as these would scarcely have given their countenance to one who, if what was said of him were true, deserved their condemnation. I am not disposed, however, though I might be well warranted in doing so, to shelter myself under the authority of names, no matter how illustrious. I give to each and all of these charges a solemn and indignant contradiction, and I will now proceed to their refutation. The charges are threefold, and I shall discuss them *seriatim*. First, I am accused of having retained Courvoisier's brief after having heard his confession. It is right that I should state the manner of that confession, as it has been somewhat misapprehended. Many suppose it was made to me alone, and made in the prison. I never was in the prison since I was called to the bar, and but once before, being invited to see it by the then sheriffs. So strict is this rule, that the late Mr. Fauntleroy solicited a consultation there in vain with his other counsel and myself. It was on the second morning of the trial, just before the judges entered, that Courvoisier, standing publicly in front of the dock, solicited an interview with his counsel. My excellent friend and colleague Mr. Clarkson and myself immediately approached him. I beg of you to mark the presence of Mr. Clarkson, as it will become very material presently. Up to this morning I believed most firmly in his innocence, and so did many others as well as myself. "I have sent for you, gentlemen," said he, "to tell you I committed the murder!" When I could speak, which was not immediately, I said, "Of course, then, you are going to plead guilty?" "No sir," was the reply, "I expect you to defend me to the utmost." We returned to our seats. My position at this moment was, I believe, without parallel in the annals of the profession. I at once came to the resolution of abandoning the case, and so I told my colleague. He strongly and urgently remonstrated against it, but in vain. At last he suggested our obtaining the opinion of the learned judge who was not trying the cause, upon what he considered to be the professional etiquette under circumstances so embarrassing. In this I very willingly acquiesced. We obtained an interview, and Mr. Baron Parke requested to know distinctly whether the prisoner insisted on my defending him, and, on hearing that he did, said I was bound to do so, and to use all fair arguments arising on the evidence. I therefore retained the brief, and I contend for it, that every argument I used was a fair commentary on the evidence, though undoubtedly as strong as I could make them. I believe there is no difference of opinion now in the profession, that this course was right. It was not till after eight hours' public exertion before the jury that the prisoner confessed; and to have abandoned him then would have been virtually surrendering him to death. This is my answer to the first charge. I am accused, secondly, of having "appealed to Heaven as to my belief in Courvoisier's innocence," after he had made me acquainted with his guilt! A grievous accusation. But it is false as it is foul, and carries its own refutation on its face. It is with difficulty I restrain the expression of my indignation; but respect for my station forbids me to characterize this slander as it deserves. It will not bear one moment's analysis. It is an utter impossibility under the circumstances. What! appeal to Heaven for its testi-

mony to a lie, and not expect to be answered by its lightning? What! make such an appeal, conscious that an honorable colleague sat beside me whose valued friendship I must have for ever forfeited? But, above all and beyond all, and too monstrous for belief, would I have dared to utter that falsehood in the very presence of the judge to whom but the day before, I had confided the reality? There, upon the bench above me sat that time-honored man — that upright magistrate, pure as his ermine, "narrowly watching" every word I said. Had I dared to make an appeal so horrible and so impious — had I dared to outrage his nature and my own conscience, he would have started from his seat and withered me with a glance. No, Warren, I never made such an appeal; it is a malignant untruth, and sure I am, had the person who coined it but known what had previously occurred, he never would have uttered from his libel mint so very clumsy and self-proclaiming a counterfeit. So far for the verisimilitude of his charge. But I will not rest either on improbability, or argument, or even denial. I have a better and a conclusive answer. The trial terminated on Saturday evening. On Sunday, I was shown in a newspaper the passage imputed to me. I took the paper to court on Monday, and, in the aldermen's room, before all assembled, after reading the paragraph aloud, I thus addressed the judges — "I take the very first opportunity which offers, my lords, of most respectfully inquiring of you whether I ever used any such expression?" "You certainly did not, Phillips," was the reply of the late lamented lord chief justice, "and I will be your vouchee whenever you choose to call me." "And I," said Mr. Baron Parke, happily still spared to us, had a reason which the lord chief justice did not know for watching you narrowly, and he will remember my saying to him, when you sat down, "Brother Tindal, did you observe how carefully Phillips abstained from giving any personal opinion in the case?" To this the learned chief justice instantly assented." This is my answer to the second charge. Thirdly, and lastly, I am accused of having endeavored to cast upon the female servants the guilt which I knew was attributable to Courvoisier. You will observe, of course, that the gravamen of this consists in my having done so after the confession. The answer to this is obvious. Courvoisier did not confess till Friday; the cross-examination took place the day before, and so far, therefore, the accusation is disposed of. But it may be said I did so in my address to the jury. Before refuting this, let me observe upon the disheartening circumstances under which that address was delivered. At the close of the, to me, most wretched day on which the confession was made, the prisoner sent me this astounding message by his solicitor — "Tell Mr. Phillips, my counsel, that I consider he has my life in his hands." My answer was, that as he must be present himself, he would have an opportunity of seeing whether I deserted him or not. I was to speak on the next morning. But what a night preceded it! Fevered and horror stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! I did try to save it. I did every thing to save it except that which is imputed to me, but that I did not, and I will prove it. I have since pondered much upon this subject, and I am satis-

fied that my original impression was erroneous. I had no right to throw up my brief, and turn traitor to the wretch, wretch though he was, who had confided in me. The counsel for a prisoner has no option. The moment he accepts his brief, every faculty he possesses becomes his client's property. It is an implied contract between him and the man who trusts him. Out of the profession this may be a moot point; but it was asserted and acted on by two illustrious advocates of our own day, even to the confronting of a king, and, to the regal honor be it spoken, these dauntless men were afterwards promoted to the highest dignities. You will ask me here whether I contend on this principle for the right of doing that of which I am accused, namely, casting the guilt upon the innocent? I do no such thing; and I deny the imputation altogether. You will still bear in mind what I have said before, that I scarcely could have dared to do so under the eye of Baron Parke and in the presence of Mr. Clarkson. To act so, I must have been insane. But to set this matter at rest I have referred to my address as reported in *The Times* — a journal the fidelity of whose reports was never questioned. You will be amazed to hear that I not only did not do that of which I am accused, but that I did the very reverse. Fearing that, nervous and unstrung as I was, I might do any injustice in the course of a lengthened speech, by even an ambiguous expression, I find these words reported in *The Times*: — "Mr. Phillips said the prosecutors were bound to prove the guilt of the prisoner, not by inference, by reasoning by such subtle and refined ingenuity as had been used, but by downright, clear, open, palpable demonstration. How did they seek to do this? What said Mr. Adolphus and his witness, Sarah Macer. And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all necessary to his case to do so. It was neither his interest, his duty, nor his policy to do so. God forbid that any breath of his should send tainted into the world persons depending for their subsistence on their character." Surely this ought to be sufficient. I cannot allude, however, to this giant of the press, whose might can make or unmake a reputation, without gratefully acknowledging that it never lent its great circulation to these libels. It had too much justice. The *Morning Chronicle*, the *Morning Herald*, and the *Morning Post*, the only journals to which I have access, fully corroborate *The Times*, if, indeed, such a journal needed corroboration. The *Chronicle* runs thus: — "In the first place, says my friend Mr. Adolphus, and says his witness, Sarah Macer — and here I beg to do an act of justice, and to assure you that I do not for a moment mean to suggest in the whole course of my narrative that this crime may have been committed by the female servants of the deceased nobleman." The *Morning Post* runs thus: — "Mr. Adolphus called a witness, Sarah Macer. But let me do myself justice, others justice, by now stating, that in the whole course of the narrative with which I must trouble you, I beg you would not suppose that I am in the least degree seeking to cast the crime upon any of the witnesses. God forbid that any breath of mine should send persons depending on the public for subsistence into the world with a tainted character." I find the

Morning Herald reporting me as follows: — "Mr. Adolphus called a witness named Sarah Macer. But let me do myself justice and others justice by now stating that in the whole course of the narrative with which I must trouble you I beg that you will not suppose that I am in the least degree seeking to cast blame upon any of the witnesses." Can any disclaimer be more complete? And yet, in the face of this, for nine successive years has this most unscrupulous of slanderers reiterated his charge. Not quite three weeks ago he recurs to it in these terms: — "How much worse was the attempt of Mr. Phillips to throw the suspicion of the murder of Lord William Russell on the innocent female servants, in order to procure the acquittal of his client, Courvoisier, of whose guilt he was cognizant?" I have read with care the whole report in *The Times* of that three hours' speech, and I do not find a passage to give this charge countenance. But surely, surely, in the agitated state in which I was, had even an ambiguous expression dropped from me, the above broad disclaimer would have been its efficient antidote. Such is my answer to the last charge; and, come what will, it shall be my final answer. No envenomed reiteration, no popular delusion, no importunity of friendship, shall ever draw from me another syllable. I shall remain in future, as I have been heretofore, *auditor tantum*. You know well how strenuously and how repeatedly you pressed me to my vindication, especially after Lord Denman's important conversation with you, and you know the stern disdain with which I dissented. The *mens conscia recti*, a thorough contempt for my traducer, the belief that truth would in the end prevail, and a self-humiliation at stooping to a defence, amply sustained me amid the almost national outcry which calumny had created. Relying doubtless upon this, month after month, for nine successive years, my accuser has iterated, and reiterated his libels in terms so gross, so vulgar, and so disgraceful, that my most valued friends thought it my duty to them publicly to refute them. To that consideration, and to that alone, I have yielded; in deference to theirs, relinquishing my own opinions. If they suppose, however, that slander, because answered, will be silenced, they will find themselves mistaken.

> "Destroy the web of sophistry — in vain —
> The creature 's at his dirty work again."

No, no, my dear friend, invention is a libeller's exhaustless capital, and refutation but supplies the food on which he lives. He may, however, pursue his vocation undisturbed by me. His libels and my answer are now before the world, and I leave them to the judgment of all honorable men.

C. Phillips.

Recent American Decisions.

Supreme Court of New York—September Term, 1849, *at Albany*. Before Justices WRIGHT, HARRIS, and PARKER.

GEORGE TRUSCOTT ET AL. *v.* RUFUS H. KING.

A judgment or mortgage may be taken to cover future liabilities and advances.

The person taking such security will be protected, whether the agreement appears on the face of the papers, or rests in parol.

A judgment may be confessed to "R. S. W." to cover future advances to be made by "R. S. W. & Co."

Where a subsequent mortgage creditor filed a bill to set aside such judgment, and alleged that it was confessed to secure R. S. W. for future advances made by him, and the answer did not allege that any other person than R. S. W. was interested in such security, and proof that the judgment had been taken for the benefit of "R. S. W. & Co." had been received without objection, the plaintiff was not permitted to avail himself of the variance at the hearing.

A record of a mortgage is notice to a subsequent purchaser, but does not affect a prior purchaser or incumbrancer. The act is prospective, and not retrospective in its operation.

A judgment to cover future advances was docketed 14th October, 1835. A mortgage to another creditor was recorded 16th October, 1837, after which date most of the unpaid advances by the judgment creditor were made. *Held*, that the recording of the mortgage was not *constructive* notice to the prior judgment creditor; and *held*, also, that such judgment creditor was to be protected in his lien for advances made after the recording of the mortgage, and before he had *actual* notice of such mortgage.

THIS was an appeal from a decree made in the late court of chancery.

On the 22d April, 1835, Russell S. Brown, and Rodman Starkweather confessed a judgment in the supreme court of this state, to Richard S. Williams, on bond and warrant of attorney for $40,000 of debt and $18·79 costs, which was entered and docketed, on the 14th October, 1835. This judgment was given to secure indebtedness then existing to, and advances thereafter to be made by, the firm of Richard S. Williams & Co.

On the 15th September, 1837, Russell S. Brown executed to George Truscott and John C. Green, a bond, conditioned to pay $50,000: and to secure the same, said Brown, and also Rodman Starkweather and wife executed to Truscott and Green

a mortgage on real estate in the city of Buffalo. The mortgage was recorded on 16th October, 1837. Said mortgage was assigned to Janet Stretch, and was foreclosed by bill in chancery. Pending the foreclosure suit, Brown died, leaving a will by which he devised his property to Starkweather. The suit was revived, and decree for sale made, on 9th December, 1845.

After the death of Brown, Williams revived his judgment by *scire facias*, on 1st January, 1845, and afterwards assigned it to King, the defendant, who issued execution thereon, and sold the premises in question, (being the same real estate covered by the mortgage aforesaid) and on the 4th August, 1845, they were bid in by King.

Neither Williams nor King were made parties to the foreclosure suit.

It was proved that at all times after the giving of the judgment, there was due to Richard S. Williams & Co., over $20,000, for advances made to Brown and Starkweather. That on 20th February, 1839, on a settlement between Williams & Co., and Brown and Starkweather, there was due to the former $22,742,26; and that there was over $30,000 due on the judgment when it was assigned to King. Most, if not all of the indebtedness due upon the judgment, at the time of the assignment, accrued for advances made after the 16th October, 1837.

The plaintiff prayed that their mortgage might be declared a prior lien — that the judgment might be adjudged void, as against the claim of the plaintiffs, and that defendant might be perpetually enjoined, &c., &c.

The cause was heard on pleadings and proofs before the late vice chancellor of the eighth circuit, who dismissed the bill with costs, from which decree the plaintiffs appealed.

A. Taber, for appellants.
M. T. Reynolds, for respondents.

PARKER, J. The law is now well settled that a judgment or mortgage may be taken to cover future liabilities and advances. (5 John. Ch. Rep. 326; 6 Id. 281, 288; 5 Cowen Rep. 441; 16 John. Rep. 165; 3 Paige Rep. 614; 1 Sanf. Ch. Rep. 44;

1 Peters, 386; 1 Pick. 398; 10 Pick. 199; 24 Pick. 270; 1 Watts, 135; 6 Watts, 57; 1 Peters, 448; 4 Kent Com. 175.)

It appears as well by the pleadings as by the proofs, that the judgment confessed by Brown and Starkweather to Williams, was given to secure an indebtedness then existing, and also advances thereafter to be made. Whether this arrangement between the parties appeared on the face of the papers, or rested in parol, is not material. No objection was made to the evidence, and if made, it would not have been tenable. *Shirras* v. *Caig*, (7 Cranch, 34); *Bank of Utica* v. *Finch*, (3 Barb. Ch. R. 303.) Nor does it invalidate the claim on the judgment, that it was confessed to R. S. Williams, for the benefit of R. S. Williams & Co. Such a practice is also permissible. (24 Pick. 270.)

But it is said we must disregard the evidence that the judgment covered the liabilities of Williams and his partners, because no such fact was alleged or put in issue. The bill alleged that the judgment was to cover future advances made by Williams, and the answer claimed that it covered both future and existing advances. Neither party to this suit seems to have been aware that the partner of Williams had any interest in such advances, or in the security taken. No objection, however, was made to proving the consideration of the judgment on this ground. I do not think this objection ought now to be sustained. Substantial justice between the parties will best be administered by disregarding it. The plaintiffs have not been surprised, and if necessary, an amendment of the answer might now be allowed, so as to make the proof taken, unobjectionable. But I think that is unnecessary, especially as the first allegation now claimed to be erroneous, was made by the plaintiffs. Besides, it is strictly true, as the parties agree in their pleadings, that the judgment was for the benefit of Williams, and it does not at all affect the real question in litigation, that another person was also interested.

This brings me to the consideration of the principal question in this cause. The judgment was docketed 14th October, 1835. The plaintiffs' mortgage was recorded 16th October, 1837, after which date, most if not all of the unpaid advances were made. Neither Williams nor King had any notice of the

mortgage, unless the recording of the mortgage was constructive notice.

The recording act declares that every conveyance not recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, whose conveyance shall be first duly recorded. (2 Rev. Stat. 3d ed. 40.) The record is constructive notice to a subsequent purchaser, but it in no wise affects a prior purchaser or incumbrancer. It is *prospective*, not *retrospective*, in its operation. (1 Sanf. Ch. Rep. 419; 3 Id. 193.) *Stuyvesant* v. *Hall*, (3 Barb. Ch. Rep. 151.) A different doctrine had been supposed to be advanced by Chancellor Walworth, in *Guion* v. *Knapp*, (6 Paige Rep. 42); but the erroneous impression derived from that case was fully and distinctly corrected by him in the more recent case of *Stuyvesant* v. *Hall*, above cited.

I think it is therefore clear, that the recording of the plaintiffs' mortgage was no notice to the previous judgment creditor. We are therefore to consider the case as if the mortgage had not been recorded.

The advances, then, of the amount due on the judgment were made after the execution of the mortgage, but in entire ignorance of it. There was no notice, either actual or constructive. Is the judgment creditor in such case to be protected in preference to the mortgagee?

The plaintiffs rely on cases which it is necessary to examine.

In *Brinkerhoff* v. *Marvin*, (5 John. Ch. Rep. 327,) Chancellor Kent cited *Livingston* v. *McInlay*, (16 John. Rep. 165,) to show that a judgment as well as a mortgage may be held as security for future advances, and then added, "The limitation to this doctrine, I should think, would be, that when a subsequent judgment or mortgage intervened, further advances, *after that period* could not be covered." In supposed accordance with this dictum, the counsel for plaintiffs contends that the mortgage was an intervening right, taking preference of the advances subsequently made on the judgment, without notice to the judgment creditor. I do not think, however, it was intended by Chancellor Kent to lay down any such rule, nor did the case before him call for the decision of such a question. There is certainly no reason for making a distinction in this respect, between a judgment and a mortgage given to cover future ad-

vances; and the chancellor had immediately before, in the same opinion, cited with approbation two cases, which show that notice was necessary to give a second intervening mortgage a preference over a prior mortgage, given to secure future advances. The first was *Gordon* v. *Graham*, (cited in 7 Viner, 52, E. pl. 3; S. C. 2 Eq. Ca. Abr. 598,) in which Lord Cowper held, that if a clause be contained in a mortgage, making it a security for future advances, subsequent loans will be taken as part of the original transaction, and paid before a second mortgage intervening with notice of the clause. The other case was that of *Shirras* v. *Caig*, (7 Cranch, 34,) where Ch. J. Marshall, held that a mortgage given to secure future advances, was a protection for all advances made prior to the receipt of actual notice of the subsequent title of the defendant. Chancellor Kent could not have intended to say, and did not say, that an intervening right was complete without notice. The same remark is applicable to what was said by the same distinguished jurist, in *James* v. *Johnson*, (6 John. Ch. Rep. 429.) Nor did the question whether notice was necessary to make perfect an intervening right arise in the other cases relied on by the plaintiffs' counsel, (1 Sanf. Ch. R. 45; id. 314,) where the dictum of Chancellor Kent is repeated. In none of these cases has the question here presented, arisen.

In *Gordon* v. *Graham*, the law was carried in favor of a prior incumbrancer for future advances, much further than the defendant claims here. There A. mortgaged his estates to B. to secure a sum of money already lent to A., and also, all such other sums as should thereafter be lent or advanced to him. A. then made a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lent a further sum. Lord Cowper decreed that the second mortgage should not redeem the first mortgage without paying, as well the money lent after, as that lent before the second mortgage was made; saying, "it was the folly of the second mortgagee with notice, to take such security."

It seems to me, however, that this decision goes to a questionable extent, and that the prior mortgagee ought not to be protected in making further advances after notice of the second incumbrance. The rule "*qui prior est in tempore, potior est*

in jure" is supposed to forbid such preference. (See Powell on Mortgages, 534, note E. Boston edit. of 1828.)

Even in England where a mortgage gives a legal estate, and the doctrine of tacking obtains, the first mortgagee, who lends money after the second mortgage made, and takes a judgment as security, is allowed to tack such judgment to his mortgage, and protect himself against the second mortgagee, only when the money was lent without notice of such second mortgage. (Powell on Mortgages, 525, 527, 557.)

But I think the law correctly laid down in *Shirras* v. *Caig*, above cited. I do not find that the authority of that case has been questioned, and it seems to me conclusive upon the point under examination.

There can be no good reason for a different rule. The second incumbrancer has full knowledge of the terms and conditions of the prior incumbrance. The prior incumbrancer is ignorant of the second incumbrance. It is in the power of the second incumbrancer to give his lien a preference over future advances, by giving actual notice, and he should be required to do so; for without actual notice, it is not in the power of the prior judgment or mortgage creditor, to protect himself against loss. Unless actual notice is required in such cases, neither a judgment or a mortgage is of any value as security for future advances.

I think, therefore, the vice-chancellor was right in dismissing the bill with costs, and the decree must be affirmed with costs.

Court of Appeals of New York.

HIRAM BARNEY *v.* FRANCIS GRIFFIN ET AL.

An insolvent's assignment of his property in trust, to pay specified creditors, is void, unless all his property is unconditionally surrendered for the payment of his debts. Such an assignment is also void, if by its terms the assignees are authorized to sell on credit.

THE opinion of the court, which sufficiently discloses the facts of the case, was delivered by

BRONSON, J. This was an assignment by an insolvent debtor

of all his property in trust, to pay certain specified creditors; and then, without making any provision for other creditors, in trust to re-convey the residue of the property to the debtor. We need go no farther to see that this was a fraud upon the plaintiff, and the other creditors who were not provided for by the deed. The property was placed beyond the reach of their judgments and executions, in the hands of men who were not accountable to them, and upon a trust which was, in part, for the benefit of the debtor.

The court have very reluctantly upheld general assignments by an insolvent debtor, which give a preference among creditors, *Boardman* v. *Halliday*, (10 Paige, 229, 230); and they can only be supported when they make a full and unconditional surrender of the property for the payment of debts. The debtor can neither make terms, nor reserve any thing to himself, until after all the creditors have been satisfied. This question was considered upon authority, in *Goodrich* v. *Downes*, (6 Hill 238,) and we think the case was properly decided.

The deed was void upon its face, and it cannot be made good by showing that there will be no surplus for the debtor, after paying the preferred creditors. The parties contemplated a surplus, and provided for it; and they are not now at liberty to say, that this was a mere form, which meant nothing. And although it should ultimately turn out that there is no surplus, still the illegal purpose which destroys the deed is plainly written on the face of the instrument, and there is no way of getting rid of it. The cases already cited, of *Goodrich* v. *Downes*, and *Boardman* v. *Halliday*, are in point upon this question.

It is also an unanswerable objection to the deed, that the assignees are authorized to sell the property on credit. An insolvent debtor cannot, under color of providing for creditors, place his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit, without delay. They have the right to determine for themselves whether the property shall be sold on credit; and a conveyance which takes away that right, and places it in the hands of the debtor, or in trustees of his own selection, comes within the very words of the statute; it is a conveyance to hinder and delay creditors, and cannot stand. This question was consid-

ered by the chancellor in *Meacham* v. *Steines*, (9 Paige, 405–6,) and his views fully accord with my own.

There is a third objection to the deed. The property is not only charged with the payment of "all costs, charges, disbursements and expenses" in executing the trust, but the trustees are also to have "a commission of six per cent. on the gross amount of the moneys received and paid by them." If the debtor can provide for any thing more than the necessary expenses of executing the trust, I think he cannot go beyond the commissions allowed by law to executors, administrators, and guardians for similar services, (See *Meacham* v. *Steines*, 9 Paige, 398); which, considering the magnitude of the estate, is much less than the trustees are to receive. (2 R. S. 93, § 58, p. 153, § 22.) It may be very true, as the answer alleges, that the commissions allowed by the deed are "no more than a just, fair, and proper compensation to three men, all actively engaged in professional pursuits."

But unless something was to be done besides winding up the estate without delay for the benefit of creditors, it was not necessary to have three trustees; and a competent agent might have been found who would not have required a very large commission on account of the value of his time for professional pursuits. If an insolvent debtor should be allowed to give a large reward to the friends whom he selects and puts in the place of the process and officers of justice, it would not only divert a portion of the property from those who ought to have it, but it might induce the assignees to consult the interest of the debtor at the expense of the creditors.

This objection, standing alone, may not go beyond the excess of commissions. But we think the deed wholly void on the other grounds which have been mentioned. Decree affirmed.

Supreme Court of Pennsylvania — March Term, 1849, *at Philadelphia.*

Hillyard *v.* Miller.

Trusts for accumulation beyond the period allowed for the vesting of an executory limitation are absolutely void, although the fund thus to be created is directed to be ultimately applied to the foundation and support of a charity.

Where land is devised upon a trust which is void as tending to create a perpetuity, the heir is entitled to recover.

The subsequent grant by the legislature of a charter to execute such a trust, though in pursuance of the will of the testator, would not aid the devise or divest the estate of the heir: Per GIBSON, C. J.

IN error from the common pleas of Northampton.

April 26–7. This was an ejectment by the heir of Peter Miller, for a piece of land forming part of his residuary estate. The question was, whether the devise was void? The defendants were the tenant in possession, the executors of the devisor, and two incorporated religious societies, who were devisees in trust of the said residue. The will was dated Sept. 9th, 1846. The testator died in March, 1847. The testator bequeathed to "the contributors of the Female Benevolent Societies of the German Reformed and St. John's Lutheran congregations of the borough of Easton, and to their successors, the interest of $ 10,000 in trust, to be paid out of the income of my real and personal estate, half-yearly, and that the same shall be added to their capital, each one half, and remain a part thereof for ever, for the purpose of assisting the poor widows and single women, the sick, the infirm, and the stranger, and the Sunday schools, and poor children, without respect to sect or denominations, as may be directed by the members of said institutions, and no loans made by the treasurer without their consent." The societies mentioned in this clause were incorporated Sept. 10, 1846. After giving some directions immaterial to this case, the testator proceeded: —

"And whereas, I have been for a long while impressed with the importance of providing farmers of industrious and sober habits with farms, such, I mean, who have not the means to purchase for themselves and have to depend on renting, though respectable, and that also of aiding and assisting with loans such who having purchased or may purchase and find much inconvenience in borrowing from banks; and therefore having this object and the welfare of those in the adjacent townships in view, and also that of providing a suitable fund for the purposes herein mentioned, to be placed in some safe institution for the said purposes; and likewise, as it regards mechanics of good standing, of the borough aforesaid, who in making purchases and improvements, may be likewise so circumstanced, and the

amount of said loans, made safe with bond and mortgage, on good and productive farms, in the adjacent townships, and on good and productive real estate, made safe by insurance, situate in the borough aforesaid, and also for the payment of repairs and improvements, as herein directed. And having, as I have observed, this object and the welfare of all concerned in view, I do hereby give and bequeath all the residue of my estate, real and personal, whatsoever and wheresoever found, unto the corporations of the German Reformed and St. John's Lutheran congregations and churches, of the borough of Easton aforesaid (or by whatever name the same may be called or designated,) and their successors in trust, and in the event or case that the said congregations and churches should not be incorporated, then, in that case, to the ministry and congregations of said churches, and their successors in trust, until the same shall be incorporated, and for the several purposes herein mentioned and declared, and for no other purpose, intent, or uses than what is herein mentioned and declared, and concerning the same, and so far as it regards my real estate, in trust, that no part thereof shall ever be sold or alienated, by the said or any other corporation, congregation, or ministry of said churches, their successors or others, but the same shall forever thereafter be let, from time to time, to good tenants, at yearly or other rents, and upon leases in possession, not exceeding five years from the commencement thereof, and that the rents and issues or profits arising therefrom shall be applied, after paying all demands against said estate, in keeping the same constantly in repair, and towards improving the same, whenever proper and necessary, by erecting new buildings, and the net residue to be applied to the same purpose, as herein declared of and concerning the same; and so far as it regards my personal estate, in trust, to invest the same securely on bond and mortgage, on good and productive farms, in the townships adjacent and real estate as aforesaid, so that the income of said estate, with the interest, and that of the investments, &c., may form a suitable fund for the purposes herein mentioned and intended; and I do hereby declare that none of the moneys, principal, interest, dividends, rents, &c., &c., arising from the said residue, devise, and bequests, shall at any time be applied to any other purpose or purposes whatsoever than those herein mentioned and ap-

pointed, and that all moneys received on account of said estate, shall be accounted for, and as from whom, by whom, when received, and as received, to be deposited in the Easton Bank, until loaned as herein directed, and just bills of accounts and demands against said estate being paid, the balance is to be loaned as aforesaid, deposits being made in the said Easton Bank, should the same be perfectly safe in so doing, and invested in loans, secured as before mentioned and directed; and I do hereby authorize, direct, and empower Samuel Wilhelm aforesaid, to receive and collect all moneys due, or to become due, on account of said estate, and after making a deposit or deposits of the same as received, to make such loans of the same, as hereinbefore mentioned and directed, and for which purpose or purposes he is to procure suitable books and assistance, and proper and correct accounts kept in the same, and also proper vouchers to be kept to correspond with the same, and to be produced for that purpose; and I do hereby further authorize the said Samuel, for the purpose of employing laborers, and in procuring suitable materials, and making contracts with mechanics, to make all proper and necessary improvements, by erecting new buildings, and repairing others, from time to time, and draw his checks for payments for the same, and for all just demands against said estate from said deposits, on bills, which are to be receipted and held as vouchers, for which purpose suitable books are to be procured, and a competent person to keep the same, with accounts of debit and credit, are to be correctly kept to agree with said bills and receipts and other vouchers, stating to whom paid, and for what purposes or services, and of all moneys received and paid, to whom, and from whom received, so that the superintendence and transactions and matters concerning said estate may be fairly and plainly exhibited, each and every year, and the said Samuel is to receive two and a half per cent. for his services, and the amount necessary for a clerk and books. In the event, however, of the said Samuel's death, or his health or otherwise being prevented from attending to the business of said estate, even with assistance, then, in such case the said Samuel is hereby authorized to select and appoint a suitable person or persons to do and transact the business of said estate, as herein directed, in his place, so that the same be conducted and managed according

and agreeable to the intent and meaning, and for the several purposes herein mentioned and declared; and such person or persons are hereby authorized so to do, by giving good and suitable security for their faithful and just performance of the same, and the trust imposed upon them; and further, in the event of the said Samuel being unwilling or unable to select and make choice of such person or persons as in his opinion would be suitable and capable, or otherwise deemed proper for the purposes aforesaid, and should prefer and determine to give up his trust and agency, that then, in the event of such determination, the corporation, ministry, and congregations as aforesaid, and their successors in trust, are hereby authorized and empowered to make choice of such suitable person or persons, that can give security for the amount wherewith they are intrusted, and their performance and management of their trust, according and agreeable to the intent and meaning, and the several purposes herein mentioned and declared; and that, under the superintendence of a committee appointed by the ministry of said congregations, a fair and satisfactory investigation shall be made at least once a year of the affairs and concerns of said estate, as before mentioned and directed. And further, should it so happen in the lapse of time, that the income of said estate-fund should accumulate beyond the application for such loans as may, and as hereinbefore mentioned, and concerning the same and likely to remain so, and the amount thus unemployed would safely justify the undertaking, and when mechanics and others may be in want of employment, and mainly for the accommodation, maintaining, and comfort of the poor respectable infirm widows and single women: it is further my will and desire, and I do hereby direct, that there shall be erected a building on the lot of ground I own on Bushkill street, facing the Bushkill creek, of brick, of large dimensions, and in neat modern style, as an asylum for the above purposes, and the costs of the same, with the support and comfort of the inmates, to be paid out of the income of said income fund; also, for enclosing the same in front with a neat paling in front, and substantial fence on the alley and rear, and also, the lot I own east of said alley on said street, facing the Delaware, for the use of said asylum as a garden, and that the said Female Benevolent Societies and their successors shall have under their control the management and

superintendence and direction of all the affairs and concerns said institution and asylum may acquire, and the means from said income fund to carry out and support the same, and for the further supervision and management of the same, there shall be a suitable person employed and books procured for the purpose of keeping an exact and correct account kept of expenditures and credits, with vouchers for the same, to be exhibited and investigated by the societies aforesaid, and to a committee appointed by them and said Samuel Wilhelm, and their successors, to have said books and accounts examined, and make report and a statement of the balance of the same and all the affairs of said trust, for the purpose or purposes of ascertaining the amount of said fund and the net income or profits thereof, as a body politic or otherwise, as having the same in trust; and further, having had in contemplation of improving the lot I own on Ferry street, in said borough, I recommend and direct that there be erected on said lot or piece of ground a number of small brick buildings, to wit: two and two together, of fourteen feet each by thirty-two, leaving a space five feet for each, that is ten feet between each pair, as a sort of court-yard, except the two corner lots, which should be twenty feet front — the former being intended for respectable widows and single women in reduced circumstances, at low rents.

"And whereas I have certain estates in the state of New Jersey, it is my will and desire that the same be and it hereby to be placed on the same footing and condition in every respect as those in the state of Pennsylvania before mentioned; and whereas it may be proper and necessary that an act of incorporation should be passed to carry out the provision and intention of this will, I hereby direct that application shall forthwith be made by the trustees aforesaid or their successors in trust, or the executors herein mentioned, to the legislatures of the state of Pennsylvania and the state of New Jersey, to procure themselves incorporated under the title of Guardians of the Female Benevolent Society and Farmers' Friend, and to have perpetual succession, and the power to fill vacancies in their number of the election of the majority of the remaining members, so long as any vacancies shall occur, and generally with such rights, powers, and privileges as may be deemed necessary and proper to carry into effect the provisions of this

will, and for the faithful execution and right management of the trusts hereby created or intended so to be invested in the said corporation and politic so to be created as aforesaid, and their successors in trust shall thenceforth be the trustees under this my last will and testament, and shall have the management of all the residue of my estate, real and personal, so intended to be invested in the said corporation as aforesaid, for the use and purposes and trusts, subject, however, to the conditions and restrictions herein and hereby declared and concerning the same. It is further my will and desire, as before stated, that books of accounts be accurately kept, wherein every thing relating to said trust shall fully and distinctly appear, and all moneys received, from whom and upon what account, shall thereinbe stated, and also, all payments and disbursements shall be entered in said books, showing the amount paid, to whom and for what purpose the same were paid, and all vouchers shall be kept and preserved, so that the execution and management of the trust may appear clearly and distinctly to the said trustees, and to any other person or persons who may in any way be entitled to inquire into or examine the same; and it is further my will and desire to direct my said trustees, at the expiration of each and every year after they shall be fully vested with the rest and residue of my estate, real, personal, and mixed, as aforesaid, to balance the books of said trust funds in such manner as to exhibit a correct statement of the same, and of the income of said trust, and the amount of the balance and clear profits arising therefrom, after deducting all payments and necessary expenses."

The two congregations mentioned in this clause were incorporated in 1807, by the supreme court. The income of the real and personal estate of the testator exceeded $4,000. On a special verdict finding these facts, the court, (JONES, P. J.) was of opinion that the residuary devise was void, and accordingly gave judgment for the plaintiff.

A. E. Brown and *J. Sergeant*, for plaintiffs in error, contended, 1. That the bequest in the first clause of the will was undoubtedly good, since it violated no rule of law whatever, and was but a simple gift of $10,000 in charity, to two incorporated societies. 2. That the residuary devise was also valid. The

devisees, though corporations, could take as trustees: (4 Wheat. 1; 3 Pet. 115; 1 Rep. 24; 1 W. 218; 17 S. & R. 88); and, though they might be incapable of taking the legal estate, yet the trust would not fail for want of a trustee. (1 Penna. 49.) Charities are favored, and this devise to erect an asylum for widows was a charity. (2 Stor. Eq. §§ 1165—67; 1 Jarm. on Wills, 513, n. 1; 2 Ves. Jr. 389; 3 Ib. 144.)

Even if there was an objection on the score of accumulation, the devise was only void for the excess in the case of a charity, (Cruise, Dig. Tit. 38, c. 20, § 58–9); and that this might be aided or modified by the legislature, (12 Mass. 544,) as they also could aid the incapacity of the trustees, (7 J. C. R. 292; Amb. 422, 651; 3 Pet. 142); which action was contemplated by the testator, (1 Rep. 22, 25); and then the devise was good as an executory one. (3 Pet. 144.) The devise for the asylum was so disconnected from the trusts for loans, as to be capable of separate execution; and it might consume the entire income. It need not, therefore, fail through the incapacity of the first object. (6 Mad. 32, 152; 2 Pow. on Dev. 21; 10 Ves. 22; 4 Bro. Ch. 394; 6 Taunt. 359; 2 B. & Al. 710; 4 Kent. 346; Fitz. 156; 2 Ves. 640; Cowp. 651; 7 Br. P. C. 111; 5 Paig. 318; 24 Wend. 641, 666.) The devise, therefore, took effect as if the clause for accumulation were struck out. (Lew. on Perpetuities, 594, 657–9; 2 V. & B. 54; 2 Swanst. 432; 1 Pow. on Dev. 406, n.; 4 Ves. 325; 12 Mass. 355; 1 P. Wm. 332; 2 Bro. Ch. 51; 2 Ves. Jr. 698; 2 Swanst. 45; Fearn. Ex. Dev. 314; 1 Wend. 395; 1 Jarm. 201, 252, 260, 276, 733; 2 Stor. Eq. 1167; 1 D. & Cl. 311; 1 W. & S. 205.) At all events, since there are charges on the estate, the land did not descend; but remains in the trustees, for the accomplishment of those purposes. (1 Jarm. 200; 6 Taunt. 359.)

M. H. Jones and *J. M. Porter*, contrà. The question arises on the residuary devise. The first intent is to set apart a fund, which is to be perpetually loaned at interest, and on security. There is to be no expenditure of principal or interest, except for repairs, &c., until the contingencies occur: 1. Of an accumulation beyond the application for such loans;

2. Be likely to remain so; 3. The amount justify the undertaking; 4. Mechanics wanting employment. When these concur, the asylum may be erected. It is contended the purpose is indefinite, and tends to create a perpetuity, by preventing the alienation of the real estate, and continuing the ceaseless accumulation of the personalty. The ultimate charity is too remote and dependent on contingencies, and the whole provision contrary to law: whence the devise fa'ls, and the heir is entitled. The first and principal object is the creation of this loan-office. The minute and particular directions for its conduct, show it to be the great object of the testator. The trustees, moreover, are incompetent to take, for the income thus given them will exceed the limit established by the law. This trust is foreign to the objects of the charters, and hence, also, the corporations are incompetent to take or hold. (9 W. 550; 2 W. C. C. R. 447; Rep. of the Judges on the Stat. of Mortmain.) And if the trust itself be invalid, the devise is void. (2 Pow. on Dev. 13.) The devise for the charity is too remote, for it is after contingencies already stated, which will probably never happen. It is also void for indefiniteness as to the objects, so that the court cannot see that the application is proper. (2 S. & St. 295; 1 Jarm. 316; 1 Shel. on Mortm. 85; 3 Meriv. 17.) And if the fund given to the valid charity is to be ascertained, after the purposes of one which is invalid have been satisfied, the devise wholly fails. (6 Ves. 404; 9 Ib. 535; 2 V. & B. 297; 4 Wheat. 43; 1 Jarm. 321; Wm. Kelyng, 13; 2 D. & Cl. 74; 2 J. & W. 277.) There can be no acceleration when the first devise is illegal. (1 Jarm. 513; 24 Pick. 146; 3 Dow. 194; 1 Swanst. 200.) The means by which this charity is to be created, is equally objectionable. It creates a perpetuity, which is prohibited by the law. (1 Verm. 164; Lewis on Perp. 163; 1 Dr. & War. 245; 3 M. & K. 534; 9 Pet. 316.) The ordinary rule against perpetuities was established by the discretion of the judges; but this limitation transcends that rule: there are no lives on the determination of which the expenditure is to commence, and it is certain that it cannot in twenty-one years. That the limitation over is to a charity can make no difference, is shown from 1 Vern. 164; 2 P. Wm. 369; 3 M. & K. 534. And if the period must exceed twenty-one years, though there is no preceding

limitation for life, is equally void: (4 Russ. 403; 1 Jarm. 230; Lewis on Perp. 172.) Precisely the same objections exist in the cases of charities, as to other alienations in mortmain — the withdrawal of property from commerce. As to the first object — the loan-office — this, in no sense, can be called charitable. Its terms are the extreme legal interest and landed security.

Gibson, C. J. Trusts for accumulation of income, are as rigidly restricted by the rule against perpetuities, as legal estates. In the *Duke of Norfolk* v. *Howard*, (1 Vern. 164,) Lord Keeper Guilford said, "all men are desirous to continue their estates in their families; and if they could come nearer to a perpetuity in equity, than the rules of law would admit, they would settle their estates by way of trust, which might benefit the court, but would be destructive of the commonwealth." In subsequent cases, such trusts have been frequent subjects of litigation in equity. It was the indestructibility, not only of springing and shifting uses, and of executory devises, but also of future trusts, which forced upon the judges the rule against perpetuities, in order to set bounds to the remoteness of, not only legal, but equitable limitations; and it acts upon perpetuities wherever they appear, except in conveyances in mortmain, or to charitable uses. A perfect definition of a perpetuity has not been given, and the nearest approach to it is found in Lewis on Perpetuities, ch. 12, where it is said to be a future limitation, whether executory or by way of remainder, and of real or personal property; which is not to vest till after the expiration of, or which will not necessarily vest within, the period prescribed by law, for the creation of future estates, and which is not destructible by the person, for the time being, entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event. If every perpetuity is a future limitation, the devise before us is not a perpetuity; for the limitation is immediate, and it vested, if at all, at the testator's death. But though, as it is said, trusts for accumulation have no immediate connection with the doctrine of perpetuities, they may sometimes fall within the rule against them. The mischiefs of such trusts, when the limitations are immediate and absolute, are as great as when

they are future and contingent; and that they are not suffered to last forever, is shown by cases of trusts to accumulate a fund for the renewal of leases, which must be restricted to the prescribed period, either expressly or by reference to the time which the particular lease has to run. The same reason requires the suppression of a trust for endless accumulation, in an increasing ratio, by turning interest into principal, which would be a perpetuity of the worst kind. There must be a power in some person to put a stop to piling up capital from income, and to deal with the estate, in some reasonable time, as an unshackled one. No trust of this class can be allowed to last beyond the period for the vesting of an executory limitation; or even so long, if it be not then to vest in a person capable to convey it in fee, by deed, fine, or common recovery. A case near the point, is *Grig* v. *Hopkins*, (Sid. 37,) in which trustees of a term limited in tail, remainder in tail, were decreed to convey the estate over, because, as a term cannot be entailed, there would have been a perpetuity in the trustees. Still nearer is *Griffith* v. *Blunt*, (4 Beav. 252,) in which a trust to accumulate income for children, which was to vest in them at the age of twenty-five, was held to be void, because the vesting was too remote. But there is no need of an authority for a principle so evidently founded in wisdom and reason. What matters it, whether the testator limited the estate over, so as to retain it in his dying clutch, for a period longer than the law allows, for the vesting of an executory limitation; or, whether intending to clutch it forever, he did not limit it over at all? The mischief of indulging him would be the same, and the rule to restrain him must be the same. It might be supposed that the trust, if not sustainable in its extent, would be good for the time the law allows for the suspension of absolute power over the ownership; and certainly the decisions on the 39 and 40 G. 3, ch. 98, which narrowed the legal period for trusts of accumulation, have affirmed them for the statutory period, and disaffirmed them only for the excess — "a rule of construction," says Mr. Lewis, "entirely novel." And so indeed it was; for no transgressive trust was ever sustained, for any part of the common-law period. We have no such statute; and this trust, if transgressive, is void in the whole. And now for the application of

the preceding principles to it, in the aspects in which it presents itself.

The testator directed a fund to be raised from the income of the estate, first, and principally, to accommodate farmers with loans for the purchase of land, and mechanics for the prosecution of their business; and, secondly, if the surplus income should allow it, to endow a hospital, for infirm widows and single women. The loan-office, as it has been aptly called, and the hospital, or asylum, as the testator calls it, would both perhaps be charities, within the statute of charitable uses; but, it follows not that the first of them would be a charity here. Without stopping to discuss that point, take it for granted that it was a charity, for the sake of the argument. Now, a gift to a charity is not necessarily affected by the rule against perpetuities, as it is in the very nature of such a gift to withdraw the thing given from commerce and circulation, since alienation of it would be inconsistent with the use to which it had been dedicated; and therefore it is, that a gift to an English charity is good, if it fall not within the prohibition of the 9 G. 2, ch. 36, which avoids gifts to charities that have not been made by deed, six months before the donor's death.

But a trust for perpetual accumulation of a part of the income, though a consequence not intended, and though the founding of a charity were the exclusive motive, would be a perpetuity, productive of all the evils which the law abhors; for it would ultimately draw into its vortex all the property in the state. For proof of it, take the trust before us in connection with the principal charity, so to speak, but disconnected from the other, which may never be called into active existence. We would then have a gift of real and personal estate, in trust, to lend the income and increase the capital to infinitude by investing the interest of it, *toties quoties*, in other loans secured by bonds and mortgages, the produce falling into the general mass, and being applicable to all the primary uses of the trust. It is easy to see what that would lead to. As nothing would be disbursed except for agency and repairs, loans would be multiplied while farms remained to be bought, and mechanics to be assisted; for, so long as a propensity to run in debt is an instinct of our nature, borrowers would be found. The consequence of this compounding of capital, would be the gradual

absorption of nearly all the property in the country, which would thenceforth be locked up — a consequence more prejudicial to the general weal than that which followed the trusts in Mr. Thellusson's will, which produced little inconvenience except to the persons ultimately entitled, though they were left to expire by their own limitation. The records of judicial decisions afford no case of a trust for perpetual accumulation without other aim — for no sane man would be so silly as to meditate such a thing; but when a trust is declared which is effectively such, though the object were ever so meritorious, ought it to be tolerated? Testamentary charities, as already remarked, have been prohibited by the statute last quoted; the construction of which has been so far strained as to bring within its range many cases not within its letter or its spirit. "Never," says Mr. Jarman, in his Treatise on Wills, (vol. 1, p. 211,) "was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute of the 9th of George the 2d." The judges, says Mr. Lewis, gave it the widest possible scope, and have been astute to discover arguments for the application of it to cases seemingly *extra* the letter and the spirit of it. This course of the English judges is a proof of the unmitigated evil of such trusts, in the mildest cases, and a legitimate encouragement to us to pursue it here, so far as we may consistently with precedent. Had the statute not been enacted, there is little doubt that they would have put testamentary charities under wholesome restraints of their own authority, at least so far as to deprive them of their most pernicious qualities. We mean not to say that trusts for perpetual accumulation would produce, in practice, the extreme consequence attributable to them in theory; for the inconvenience of them would be too insufferable to allow them to be carried out; but the contingent good of any charity attached to them would not compensate the actual evil attendant on them.

It is suggested that the disbursements for the hospital would return the income of the estate to the general mass of unfettered property. Out of the surplus proceeds of the income fund was to be built a hospital, or asylum, on one of the testator's lots in Easton, for the comfortable maintenance of infirm widows and single women; and, on another, small dwellings for inmates

of the same description, which were to be let to them, and the rents from which, it was supposed, would add to, rather than take from, the general income.

The first thing that strikes the mind, in regard to this, is, that the contingency which was to give practical existence to this secondary and subordinate charity, might never happen; and then a trust for indisputable accumulation would remain to go on forever, founded on what is substantially a loan-office, in the garb of a charity, and essentially no more so than a bank is a charity. The second is, that, if it did happen, it would not be certain that the disbursements for it would keep down the general income.

The contingency specified was an accumulation of interest beyond the demands on it for further loans, under circumstances of apparent probability that it would, otherwise, remain unemployed for a time when mechanics would be without employment: in other words, if a time should arrive when the trustees could do no better with the surplus interest, they were to build a hospital with it; but not till then. Is it certain that the farmers and mechanics would cease to borrow while a dollar was to be lent? The affirmative rests on conjecture, which is not a basis for judicial determination. Besides, the time is referred to the unlimited discretion of the trustees, who might execute the testator's direction according to their notion of its expediency, or not at all. The records of this court show how reluctantly these obscure charities are administered. There was neither certainty nor probability that the hospital would be erected; and to sustain the trust it was necessary to be absolutely certain. The principle which requires it to be so is derived, by analogy, from future limitations, which, though the contingency on which they are to vest may possibly happen within the legal period, are yet invalid if it may possibly not happen before the expiration of the period; an instance of which is found in *Bacon* v. *Proctor*, (1 Turn. & Russ. 31.) It is very true, that the invalidity of a subsequent contingent limitation will not defeat a present absolute and valid one, as was held in *Carver* v. *Bowles*, (2 Russ. & Mylne, 307.) But, disconnect the present trust from the future charity, and what have we? Certainly not a present valid limitation, but a naked and an invalid trust of indefinite continuance.

Moreover, it is not certain that the expenditure for the hospital would dispose of the entire income of the estate; nor did the testator suppose it would; for it certainly was not the principal object, as we see how anxiously he provided that it should not cripple the operations of the loan-office. Come what might, the lending was to go on. If a surplus were left, however small, that itself would be a nucleus, and, with its increments, a fund for perpetual accumulation. And it is highly probable, almost certain, there would actually be such a surplus. Only one building for the hospital was to be erected; and that done, the power to make the expenditure keep pace with the receipts would be spent. The outlay would be finite, the income infinite; and no power would be left to increase the one or decrease the other. But, for the reasons already given, it is enough for the judgment that it is not judicially certain there would be no surplus. Were it otherwise, a formidable perpetuity might be raised by tacking an insignificant charity to it.

To get over these objections, we have the testator's consent that a corporation be created to execute the trust, at the expense of public policy. The legislature has a constitutional right to change the law in its application to prospective cases; but, deriving its authority from the constitution, and not from individual consent, it is more than doubtful whether it could relax a rule of policy applicable to an estate already vested. The estate of the heir was divested at the testator's death, or it could not be divested at all. But no act of incorporation has been obtained, and the trust cannot be sustained upon the basis of anticipation. How long might it remain in abeyance, and yet be enforced? The legislature has not acted, and may refuse to act; in any event, a statute to confirm the devise would be disregarded. Even if it were viewed as a contingent limitation, depending on legislative action, it ought to be certain that the legislature would act within the legitimate period, else we might have a perpetuity for an indefinite time, dependent on expectation. On every ground, therefore, the heir was entitled to recover. Judgment affirmed.

Supreme Judicial Court of Massachusetts, March Term, 1849, *at Boston.*

NICHOLAS H. BINGHAM *v.* FREDERICK A. HENDERSON.

Where a contract is entered into in this state, and to be performed here, between parties who are then citizens thereof, and the creditor subsequently removes to, and becomes a citizen of another state, in pursuance of an intention to do so formed before the making of the contract: such removal and residence will not prevent the debtor's certificate of discharge, under the insolvent laws, from being a bar to an action on the contract.

THIS was an action by the payee, against the acceptor, of a draft for $ 399·84, drawn and dated September 1, 1845, at Dedham, in this state, on the defendant, at Boston, and payable to the plaintiff or his order, in six months after date, at any of the banks in Boston. The action was commenced on the 16th of March, 1846. The trial was before *Colby*, J. in the court of common pleas.

The defendant rested his defence upon a discharge under the insolvent laws of this state, by a certificate thereof in the usual form, bearing date November 23, 1846.

It was admitted, that the first publication of notice of the proceedings in insolvency was on the 17th of April, 1846; that, at the date of the acceptance, the plaintiff was in this state, where he had always lived and done business; but that he had then determined, and was making preparations, to remove to New Orleans; and that he left this state accordingly, in October, 1845, and became and was a citizen of New Orleans, when the present action was commenced.

It was also admitted, that the consideration of the acceptance was a sale of goods in this state; that the plaintiff, at the time of the sale, had a place of business here; and that the defendant, at the date of the acceptance, was, and had ever since continued to be, a citizen of Massachusetts.

The presiding judge instructed the jury, *pro formâ*, that, upon the fact admitted, the defendant's certificate of discharge was no bar to the action, and the jury returned a verdict for the plaintiff. The defendant thereupon excepted.

W. Brigham, for the plaintiff.
B. F. Brooks, for the defendant.

The opinion of the court was delivered at March term, 1849, by

METCALF, J. The question in this case arises on that clause in the seventh section of the insolvent act, (St. 1838, c. 163,) which provides that a certificate shall absolutely and wholly discharge a debtor from all debts that "are provable under this act, and which are founded on any contract made by him after this act shall go into operation, if made within this commonwealth, *or* to be performed within the same."

The contract, on which this action is brought, was provable under the insolvent act; was made after that act went into operation; was made within this commonwealth, *and* was, by its terms, to be performed within the same; and both parties were citizens of the commonwealth, when the contract was made.

The only grounds, on which the plaintiff attempts to avoid the discharge in this case, are his removal to the state of Louisiana, after the contract was made, in pursuance of an intention formed by him before it was made, and his residence in that state until the time of bringing the action. And he relies upon the decisions of the supreme court of the United States, establishing the doctrine, that a state insolvent law cannot, consistently with the constitution of the United States, affect contracts made between a citizen of that state, and a citizen of another state. See *Ogden* v. *Saunders*, (12 Wheat. 213); *Boyle* v. *Zacharie*, (6 Pet. 348, 635); *Woodhull* v. *Warner*, (1 Bald. 296); *Towne* v. *Smith*, (1 Woodb. & Minot, 115; 2 Kent Com. 6th edit. 392, 393); *Van Hook* v. *Whitlock*,, (26 Wend. 43.) The history of this judicial doctrine is somewhat remarkable; but it is now too familiar to need to be here repeated.

So far as the decisions of the supreme court of the United States clearly extend, on this point, this court regard them as of paramount authority. Accordingly, it was decided in *Savage* v. *Marsh*, and *Fiske* v. *Foster*, (10 Met. 594, 597,) and in *Woodbridge* v. *Allen*, (12 Met. 470,) that contracts, made between citizens of this state and citizens of another state, were not affected by a discharge of the debtor under our stat. of 1838, c. 163. In these cases, the parties were citizens of different states at the time when the contracts were made, and

at the time when the actions were brought. And such also was the fact in those cases, in the supreme court of the United States, in which the decisions were made, on which the present plaintiff relies, and which were followed by this court, not because the reasoning on which they were founded, was satisfactory, but because they were authoritative precedents. On all questions which involve the construction of the constitution of the United States, the supreme court of the United States is the only rightful ultimate tribunal; and its decisions on those questions cannot be withstood or disregarded by state courts, without a dereliction of duty and a violation of the cardinal principles of the federal government. But that court has not decided that a contract, made between citizens of the same state, cannot be affected by its insolvent laws, if one of the parties afterwards becomes a citizen of another state. And in the last case on this subject, which has come before that court, *Cook* v. *Moffat*, (5 Howard, 295,) the counsel for the creditor denied the validity of the debtor's discharge from the obligation of his contract in these words: "It is a contract between citizens of different States *at the time when made;* and this is the part and the principle which excludes it from the operation and effect of a release of the debtor under the insolvent laws of his state."

Mr. Justice Story, in his commentaries on the constitution of the United States, (Vol. 3, § 1384,) says that the result of the decisions, on the subject of prospective state insolvent laws, is as follows: "1. That they apply to all contracts, made within the state, between citizens of the state. 2. That they do not apply to contracts made within the state, between a citizen of a state and a citizen of another state. 3. That they do not apply to contracts not made within the state. In all these cases," (that is, of the second and third classes,) "it is considered that the state does not possess a jurisdiction, coëxtensive with the contract, over the parties; and therefore that the constitution of the United States protects them from prospective, as well as retrospective legislation."

Mr. Justice Johnson, in concluding his opinion in the case of *Ogden* v. *Saunders*, (12 Wheat. 369,) states these three propositions: "1. That the power given to the United States, to pass bankrupt laws, is not exclusive. 2. That the fair and

ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of the citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial power granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the constitution of the United States."

These passages show the grounds on which the supreme court of the United States have decided that contracts between citizens of different states cannot be affected by state insolvent laws. As has been already stated, our judgments are not convinced by the reasons given for those decisions. We concur with Chief Justice TANEY, (5 Howard, 310,) who says, "to the first two propositions maintained in the opinion of JUDGE JOHNSON, I entirely assent. But when the two clauses in the constitution therein referred to, are held to be no restriction, express or implied, upon the power of the states to pass bankrupt laws, I cannot see how such laws can be regarded as a violation of the constitution of the United States, upon the grounds stated in the third proposition."

But we deem ourselves bound, for the reason before given, to conform our decisions, on matters relating to the federal constitution, to the decisions of the court established by that constitution. That court has never decided the question now brought before us; nor made any decision inconsistent with the defence on which the defendant relies. As the plaintiff was a citizen of this commonwealth, when the contract in question was made with him, and has resorted to the courts of the commonwealth to enforce that contract, we do not perceive why we do not "possess a jurisdiction, coëxtensive with the contract, over the parties." The plaintiff's intention, formed before the contract was made, to remove to Louisiana, cannot have any effect on the case. And if his removal from Boston to New Orleans would enable him to avoid the defendant's discharge, so would the removal of a creditor across the line of the state, (however small the distance,) enable him to do the same; thus making the operation of the insolvent law, upon contracts made

between debtor and creditor, citizens of the commonwealth, to depend upon the will of the creditor. In the language of the late Justice HUBBARD, with reference to another subject, (4 Met. 404,) "it will be time enough to yield in this matter of state jurisdiction, when the question of right has been determined by the highest tribunal." Verdict set aside.

Supreme Court of Vermont, Windsor County, March Term, 1849.

WILLIAM H. SABIN *v.* THE BANK OF WOODSTOCK.

E. L. S., a brother of the plaintiff, owned in Oct. 1835, nearly two hundred shares of the capital stock of the defendant corporation. He was not then indebted to the bank. At that time he transferred the stock to sundry persons, in order to control an election of bank officers, taking from them proxies for the purpose of voting in their names. From that time until Nov. 16, 1839, when the defendant caused an attachment of the shares, E. L. S. controlled them as his own property, and most of them were reconveyed, except four, which were transferred to the plaintiff. In Oct. 9, 1837, a second distribution was made in the same manner, and for the same purpose, and two additional shares were conveyed to the plaintiff. The debt upon which the defendant attached the shares accrued on the 6th of January, 1837. The six shares of the plaintiff were sold, on execution, Dec. 19, 1840. The plaintiff had no beneficiary interest in them until Oct. 25, 1837, when he took them in satisfaction of preëxisting debts. E. L. S. received all dividends upon these shares, which were paid before the sale on execution, and the plaintiff made no claim upon the bank until 1841, when there remained one dividend (due prior to the sale) unpaid, which was paid to him (plaintiff.) He then demanded the subsequent dividends which the bank refused to pay. *Held*, that the plaintiff could not hold the six shares as against the bank, but that it was clearly his duty, in view of all the facts, to give notice to the bank when he acquired the beneficial interest.

Whether transfers of bank stock for the purpose of defeating the objects of the charter, are to be considered valid, under any circumstances, *quare.*

THE important facts in this case are briefly; that Elisha L. Sabin, a brother of the plaintiff, owned in October, 1835, nearly two hundred shares in the capital stock, and was not indebted to the bank. At that time, and for the purpose merely of increasing his vote, in the election of bank officers, he conveyed one hundred and eighty shares to forty-five different persons, taking from them proxies for the purpose of voting in their names.

From that time forward, until the defendants attached the shares, on the 16th day of November, 1839, Elisha L. Sabin

continued to control the shares, as his own property, without any intimation from any source, that they were not in fact exclusively so. During the time Elisha L. Sabin had obtained of the bank large credits, upon the pledge and faith of his being the owner of this stock. Most of the shares had, in the meantime, been reconveyed to Elisha L. Sabin; but the plaintiff's four shares, or those conveyed to him, had remained on the books of the bank in his name. The debt upon which the defendants attached the shares accrued on the 6th of January, 1837.

On the 9th of October, 1837, Elisha L. Sabin again distributed his stock in the same manner, and for the same purpose. At this time said Elisha L. Sabin was indebted to the bank in a larger sum than all his stock, which has never been satisfied, except by a sale of said stock. At this time two additional shares were conveyed to the plaintiff. The plaintiff had no interest whatever in these six shares, (which were sold by the bank as the property of Elisha L. Sabin, and to pay his indebtedness to the bank, and upon execution, on the 19th day of December, 1840, and which are in controversy in this suit,) until the 25th day of October, 1837, when he took them of his brother, in payment of debts he had against him.

That portion of the charter of the bank, by which defendants claim to hold these six shares, as the property of Elisha L. Sabin, is as follows: "That the shares in said bank shall be transferable, in such manner as shall be prescribed by the by-laws of said corporation. Provided, That no transfer shall be valid, until the same shall be recorded in a book, to be kept by the directors, in said bank, for that purpose, and unless the person making the same, shall have previously discharged all debts due from him or her to said corporation."

The last transfer made by Elisha L. Sabin, 9th of October, 1837, was made at the suggestion of persons, who were at the time directors of the bank and who constituted a majority of the board, but acting separately, but for the common object of securing their own reëlection. These transfers were all recorded upon the books of the bank in due form. Elisha L. Sabin received all the dividends upon these six shares, which were paid before the sale upon execution. And the plaintiff made no claim upon the bank until 1841, when there remained one divi-

dend upon these shares, prior to the sale, unpaid, which was then paid to plaintiff, he at the time making demand of the subsequent dividends, (after the sale,) which the bank refused to pay.

The question to be determined is whether, under this state of facts, the plaintiff is entitled to hold the six shares against the bank. This will depend upon the question, at what time the plaintiff's title is to be regarded as accruing, as between him and the bank.

We should not be inclined to question, that a *bonâ fide* purchaser of shares of one in whose name the shares stood on the books of the bank, and who was not himself indebted to the bank, would acquire good title to the shares, as against the world. Such seems to be the rule laid down in the English cases, cited in argument, even when the transfers have been made by virtue of forged powers of attorney. This is done to give greater security to that species of property, and is really for the advantage of the banks, inasmuch as the value of the property depends somewhat upon the perfect security of the title. It is also esteemed somewhat culpable, in the officers of such a corporation, to suffer a transfer of stock to be made up on their books, by means of a forged power, when it is supposed they possess readier means of detecting the genuineness of the handwriting as well as of the other transactions of their share-holders, than strangers have. So that one who purchases stock in these corporations is not obliged to look beyond the books of the bank, for the evidences of title, and if he purchases, upon that appearance is entitled to receive the dividends of the bank. They, too, would be liable also to pay the dividends to the true owner, if they had suffered the transfer to be entered upon their books, upon insufficient authority. This is substantially the rule of the English courts and of many of the American states, and of the national courts. The opinion of TANEY, C. J. in *Lowry* v. *The Commercial and Farmers' Bank, of Baltimore*, in the circuit court, decided in July, 1848, which we have not seen, except as reported through the newspapers, is to the same effect, if we correctly apprehend its principle. That was the case of a transfer, suffered by the bank, through the agency of an executor, who, by the will, was not authorized to make the transfer. The court held that the bank was bound to look into the will, for the purpose of learning the extent of the

executor's authority, and were culpable for not doing so, and chargeable with implied notice of the contents of the will.

But it does not seem to us, that the present case comes within this principle. The great question here is, whether the plaintiff was at liberty to purchase these shares, upon the faith of the former title merely being in himself; or whether his having for years suffered the former nominal owner, and in fact the real owner, to treat the stock to all intents as his own, he was not bound to make inquiries, as to the state of the title, before he purchased, and after he purchased to give notice to the bank of his having become the beneficial owner, before he could compel the court to protect him as such? It seems to us, that such was his duty.

We do not, indeed, feel prepared to say precisely how far such merely formal transfers upon the books of the bank, and for the purpose of defeating the proper objects of the charter, in one particular, are to be regarded as of any force whatever, as to those who are instrumental in bringing them about. Reason and policy and justice, would seem to require that they should be treated as simply void. But certainly the plaintiff had no reason to expect, that the bank would deal any differently with his brother, on account of any such new shadow of a transfer, while he was all the time receiving the dividends, and treating the stock to all intents, as his own, which it in fact was. Nor can it be supposed that any honorable man would act upon any such expectation. We think, therefore, that his title must date, as between himself and the bank, from the time they had notice of such title.

And the fact, that certain persons, who formed the majority of the board of directors, advised this distribution of the stock, can, in our apprehension, make no difference. As directors, they had no right to make or advise any such operation. It was not supposed by any one, that, as directors, they had any such authority, or that they professed to act upon any such ground. We think, therefore, that all the plaintiff's shares must be considered, as standing upon the same ground. So far as the bank was concerned, at the time of the attachment and sale, the title was in Elisha L. Sabin.

It is, perhaps, not necessary to go further. We entertain, however, upon the present argument, no reasonable doubt that

the mode of transfer of stock pointed out in the charter, is the only mode which the public are bound to regard as conveying the title. All persons, unaffected with notice to the contrary, are at liberty to act upon the faith of the title being where it appears upon the books of the corporation to be.

This view we do not think inconsistent with the notion, that any other mode of conveyance may be perfectly good, between the parties to it, and to all others having notice of it, the same as an unrecorded deed, or notice of a mere equity.

It seems to us reasonable to conclude, that the defendants, as a corporation, under their charter, might refuse to allow the transfer of stock to go upon their books, until all debts due from the grantor, or seller, to the bank were paid. Indeed, this seems the only mode in which they could produce their lien against the title of a *bonâ fide* purchaser.

But if a formal transfer of stock were made upon the books of the bank, by mistake, or in any other way, not intending to convey title, we do not think one who had knowledge of that fact would acquire any title, as against a *bonâ fide* owner or pledgee, by purchase of the person in whose name the stock stands. These are, we believe, but elementary principles in the law, as they certainly are in reason, justice, and morals.

Judgment affirmed.

District Court of the United States, Northern District of New York, November 16, 1849, *at Buffalo.*

PHILANDER HODGE, Respondent, *v.* JOHN BEMIS ET AL., Libellants.

The libellant in an admiralty suit *in personam*, is entitled, under the Rules prescribed by the Supreme Court of the United States regulating the practice in causes of admiralty and maritime jurisdiction, to process of arrest against the person of the defendant, notwithstanding imprisonment for debt has been abolished by law in the state where the suit is brought.

THE facts of the case appear in the opinion of the Court.

CONKLING, J. The defendant having been arrested on mesne process, issued at the suit of the libellants, a motion

is now made, in his behalf, to discharge him from arrest, on the ground that the process was not warranted by law.

In January, 1845, in pursuance of the act of Congress of August 23d, 1842, (ch. 188,) the supreme court of the United States prescribed a code of rules to regulate the practice of the courts of the United States, in cases of admiralty and maritime jurisdiction. Among these rules are the following:—

"In suits *in personam* the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*, or by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for, in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

"In all cases when the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias*, and of a *fieri facias*, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant; and for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court."

At the date of these rules, process of arrest, both mesne and final, had, at all times, been in familiar use in the courts of admiralty of this country as well as of other countries. In thus openly sanctioning this form of process, the two rules above recited were but simply declaratory of the antecedent general law. But imprisonment for debt had been previously abolished in the state of New York, and in several other states; and by the act of congress of February 28, 1839, (ch. 35,) and the supplemental act of January 14th, 1841, these state laws, and any others for the like purpose which might by any of the states be subsequently enacted, were expressly adopted and

declared obligatory upon the courts of the United States, sitting in the states where they should exist. The language of these rules, purporting to have been framed under a power conferred by a subsequent act of congress, is nevertheless explicit and unlimited. On what ground then can the courts for whose guidance they were prescribed, lawfully refuse to carry them into effect?

It has been suggested that the above cited acts of congress, adopting the state laws, may have been inadvertently overlooked by the supreme court. But, until the inferior courts shall have been informed by that court, it would be neither decorous nor proper for them to act upon this assumption; and besides, even conceding it to be well founded, the rules would still be valid and obligatory, if the supreme court had power to prescribe them.

It has been intimated, also, that congress had no authority to delegate to the supreme court a power so important as that of restoring the right to imprison for debt, after it had been abolished by law. But there are not wanting many instances of the delegation, by congress, of powers in their nature legislative, and which have nevertheless been adjudged to be valid, or been acquiesced in as such. Thus, for example, authority has been given by law to the secretary of war to prescribe regulations relative to the granting of pensions, in pursuance of which he has directed certain oaths to be taken, and has designated certain officers by whom they are to be administered; and it has been judicially held that false swearing, under these regulations, constitutes the crime of perjury.

It has, moreover, been argued that the rules in question were not warranted by the language of the act, in pursuance of which they were framed. It is readily conceded, that to justify the engrafting of even so limited an exception, upon a statute designed to secure the personal liberty of the citizen, the authority ought to be clear. On referring to the act of 1842, it will, however, be seen, that it does, in terms, invest the supreme court with plenary power and authority to regulate the forms of process and the whole practice of the courts of the United States. But even admitting the power to be doubtful, it cannot reasonably be expected of this court, that it should assume to sit in judgment upon the acts of the supreme court, on a charge of usurpation.

In regard to all these objections, it is to be further observed, that they severally assume as unquestionable that the above cited acts of 1839 and 1841, were intended by congress to embrace suits in admiralty as well as those at common law. But the supreme court may have thought otherwise. The acts of congress abolish imprisonment for debt on process issuing from a court of the United States, where it is forbidden by the state law. But there are no state courts of admiralty, and no admiralty process, therefore, to which the state laws, *proprio vigore*, apply.

Perhaps, however, the most probable supposition is, that the supreme court, whatever it might suppose to be the true construction of the acts of 1839 and 1841, believing itself fully warranted by the subsequent act of 1842, even to restore to suitors in the admiralty, if in truth it had been abrogated, the right to all the customary and long established forms of process, was of opinion that the abolition of the process of arrest, and along with it, of those securities exacted and enforced, by means of it, so conducive to the effectual and speedy enforcement of justice, would be unwise and inadmissible.

But whatever views of the subject may have governed the supreme court, in the adoption and promulgation of the rules in question, I consider it to be my duty to give effect to them, until I shall be otherwise instructed by that court. The motion of the discharge of the defendant is, therefore, denied.

Commercial Court of Cincinnati, January Term, 1849.

MORROW & HAZZARD *v.* FINCH.

Held, that non-residence or want of citizenship of a debtor is not sufficient to authorize the arrest of a citizen of another state, and that to arrest a citizen of another state, under the provisions of the statute of Ohio authorizing a capias upon affidavit that the debtor is not a citizen or resident of the state, would be a violation of the constitution of the United States.

IN this case, the plaintiffs filed an affidavit of the nature and amount of the indebtedness of the defendant to the plaintiffs, as claimed by them; and also that the defendant was not a citizen

or resident of this state, but was a citizen of Kentucky. On this affidavit a *capias ad respondendum* issued, by virtue of which the defendant was arrested and brought into court.

Coffin & Mitchell moved for the discharge of the defendant on common bail. It appeared affirmatively upon the affidavit filed, a copy of which was endorsed upon the writ, that the defendant was a citizen of Kentucky, and they claimed that to arrest citizens of another state, under the provisions of our statute, would violate so much of the 2d section of the 4th article of the constitution of the United States as provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." They cited, *Ward* v. *Morris*, (4 Har. & McH. 331); *Campbell* v. *Morris*, (3 Har. & McH. 554); *Murray* v. *McCarty*, (2 Munford, 398); *Gassies* v. *Ballon*, (6 Peters, 761); *Butler* v. *Farnsworth*, (4 Washington, 103); *Prentiss* v. *Barton*, (1 Brock. 391); *Catlet* v. *P. Ins. Co.*, (Paine, 594); *Rogers* v. *Rogers*, (1 Page, 183); (3 Story, Com. 663–5.)

T. C. Ware, for the plaintiffs.

By the Court: Key, J. Since this motion was argued, I have consulted the judges of the common pleas, and the judge of the superior court of Cincinnati, and we all concur that the motion should be granted. We hold that to arrest a citizen of another state, under the provisions of our statute, making want of citizenship or non-residence in Ohio a cause for arrest, would violate the provisions of the constitution of the United States cited in the argument, and that that portion of our statute must be applied to persons other than citizens of the United States. Motion granted.* — *Western Law Journal.*

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* This question was argued before the superior court of Cincinnati, at the October Term, 1849, in case of Blackford v. Lackey. Mr. T. D. Lincoln made an elaborate argument in favor of the construction of the statute authorizing the arrest and imprisonment of a citizen of another state, and cited a large number of authorities. He was replied to by Messrs. W. R. Morris and C. D. Coffin. Judge Johnston in a very able opinion, sustained the construction given above by Judge Key. We hope to be able to obtain a full report of this case.

Abstracts of Recent English Decisions.

Court of Chancery, April 20, 1849.

In re Sombre. Lunacy — Supersedeas — Mental Delusions — Medical Reports. In the case of proceedings taken in this court in behalf of infants, and, in some respects, on behalf of lunatics also, this court will often disregard form; but this indulgence will not be extended to a party applying for the supersedeas of a commission of lunacy. *Semble;* this court will not order a supersedeas where the insanity of the party is attempted to be proved by, and the petition is founded on, medical opinions not ordered by the court. The evidence which will be sufficient to induce the court to supersede a commission of lunacy, must often be stronger in favor of sanity than what would have prevented the commission originally. The continuance of any insane delusion, although that delusion was formed during the treatment for insanity, is proof of the unsoundness of the mind, and the court has never superseded a commission while any distinct delusion remained. 13 Jur. 857.

Rolls Court.

Rudge v. *Winnall*, July 23, 1849. *Emblements.* A testator devised his estate to A. & B. for life, and then over, and gave to his executors all his live and dead stock, household furniture and effects, and all his personal estate and effects, whatsoever, and wheresoever, upon certain trusts: *Held*, that crops growing, at the testator's decease, on the above estate, which was in his own occupation, passed under this bequest to his executors, and did not belong to the devisee. See *West* v. *Moore*, (8 East, 339); *Cox* v. *Goodsalve*, (6 East, 604, n.); *Vaisey* v. *Reynolds*, (5 Russ. 12.) 13 Jur. 737.

Mitchell v. *Koecker*, March 7, 1849. *Discovery — Demurrer.* A bill was filed to set aside, as fraudulent, a contract entered into by the plaintiff with the defendant, for the purchase of the professional business of the latter, the contract being impeached on the ground of false representations. The plaintiff filed a supplemental bill, alleging that since filing the original bill the defendant had made a return of his professional income to the income tax commissioners as being less than £500, interrogating as to the fact, and praying to have benefit of it in the original suit. Defendant demurred to the bill because, by answering, he might subject himself to statute penalties. Demurrer allowed. 13 Jurist, 797.

Vice Chancellor of England's Court.

Affleck v. *James*, July 12, 1849. *Will — Construction — Discretionary Power of Sale.* A testatrix devised and bequeathed her residuary, real, and personal estate, after payment of debts and legacies, to two trustees, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust to invest the same in public stocks, government funds, or upon real security, or at their discretion, to keep the same in their then state of investment; the will then declared beneficial interests in the residue. One of the trustees disclaimed. *Held*, that the other trustee had a discretionary power of sale over copyhold estates of the testatrix, which were included within the residuary devise. 13 Jur. 760.

Grand Injunction Canal Company v. *Dimes*, May 31, 1849. *Interest — Jurisdiction — Injunction — Breach.* The vice chancellor of England, has no power to alter any decree made by the lord chancellor, on the ground that the lord chancellor is interested in the subject-matter.

Where an injunction had been granted restraining the stopping of vessels, and the hindering the navigation of a canal. *Held*, that bringing actions against the canal company, and warning their servants that they were trespassers, was not a breach. When, on bill filed, such an injunction had been granted and made perpetual by deed, an injunction was granted, on motion, to restrain the bringing of actions against the company. 13 Jur. 784. [This was a repetition in a new form of the case reported in 2 Monthly Law Rep. N. S. 247.]

Benyon v. *Nettlefold*, July 2, 1849. *Discovery in aid of defence at law — Immoral consideration of deed — Demurrer.* A bill for discovery in aid of a plea of immoral consideration, pleaded by the plaintiff in equity to an action of covenant, entered into by him for the payment of an annuity to the plaintiffs at law, upon trust for one Caroline N., stated that the deed of covenant was valid on the face of it, but that the consideration for it was "a prospective illicit cohabitation, and improper connection subsequently had," between the plaintiff in equity and Caroline N., but that the connection had been since altogether discontinued. Demurrer for want of equity by one of the plaintiffs at law allowed. 13 Jurist, 799. (See *Sismey* v. *Eli*, 13 Jurist, 480.) The Jurist also contains the following classification of cases furnished by counsel in *Sismey* v. *Eli*, viz.: — *Bill by man for relief. Relief given. Sismey* v. *Eli. Relief refused. Bodly V——.* (2 Ch. Cas. 15—1680, Lord Nottingham.) *Whaley* v. *Norton*, (1 Vernon, 482 — 1687, Sir T. Trevor, M. R); *Bainham* v. *Manning*, (2 Vern. 242 — 1691, Lord Commissioners); *Spicers* v. *Haywood*, (Prec. in Ch. 114 — Wright, L. K.); *Dillon* v. *Jones*, (cited 5 Ves. 290 — Lord Bathurst); *Franco* v. *Bolton*, 3 Ves. 368); *Batty* v. *Chester*, (5 Beav. 103); *Smith* v. *Griffin*, (13 Sim. 245); *Benyon* v. *Nettlefold*, (*supra.*)

Bill by woman for relief. Relief given. Kuye v. *Moore*, (1 S. & S. 61.) *Relief refused. Priest* v. *Parrot*, (2 Ves. 160 — 1751.)

Bill by Executor of man for relief. Relief given. Matthew v. *Hanbury*, (2 Vern. 187 — 1690); *Robinson* v. *Cox*, (9 Mod. 263 — 1741, Lord Hardwick); *Clarke* v. *Periam*, (2 Atk. 333); *Relief refused. Cray* v. *Rooke*, (Forest, Ca. t. Talbot, 153 — 1735); *Hill* v. *Spencer*, (Aub. 641, 836 — 1767); *Gray* v. *Matthias*, (5 Ves. 286 — 1800, Exchequer.)

Bill by woman for relief. Relief given. Kyno v. *Moore*, (1 S. & S. 61.) *Relief refused. Priest* v. *Parrot*, (2 Ves. 160 — 1751.)

Bill by woman against representatives of man. Relief given. The Marchioness of Armandale v. *Harris*, (2 P. W 432 — 1727); *Hall* v. *Palmer*, (3 Had. 532.) *Relief refused. Clarke* v. *Periam*, (2 Atk. 333 — 1742.)

Particeps criminis allowed to sue. St. John v. *St. John*, (11 Ves. 535); *Harrington* v. *Duchatel*, (1 Bro. C. C. 124); *Nevill* v. *Wilkinson*, (Id. 543.)

Robinson v. *Hedger*, July, 18, 1849. *Judgment — Charge — Insolvency.* A mortgage with a power of sale having been made, judgment was entered up by a creditor against the mortgagor, who was subsequently imprisoned, and discharged under the insolvent debtors' act. The mortgagees, whilst the mortgagor was in prison, sold under their power, and the purchase money was invested in the names of the mortgagor and the assignees. At the suit of the judgment creditor they were restrained from parting with a part of the purchase-money. 13 Jur. 847.

Vice Chancellor Knight Bruce's Court.

Gaston v. *Frankum*, November 9, 1848. *Pleading — Separate Estate — Contract of Married Woman — Waiver.* A married woman, having separate property, and who was living apart from her husband, made an agreement to take the lease of a dwelling house: — *Held* that, to the extent of her separate property, she was liable to pay the rent. 13 Jur. 739.

Devale v. *New River Company*, April 19, 1849. *Construction of Will* — A testator who was entitled to a portion of a New River share, left all his property to T. H. in trust for purposes and legacies he should make in his codicil. The will was attested so as to pass real estate. The testator made a codicil, but it was not attested so as to pass real estate. The testator left no heir. *Held*, that the New River share was real estate. 13 Jur. 761.

Coombs v. *Brooks*, May 26, 1849. *Payment out of court of a contingent fund, to enable an indigent party to try issues.* A. and his wife were successively entitled for life to dividends, and the capital was held in trust for his children, who should attain the age of twenty-one or marry, the same fund was in trust for B. and his children in a similar manner. A fund was in court, called the "Contingent account of A. and his wife and children." A. and his family petitioned for a sale of a part of this fund, to enable him to try issues directed by the court, which should decide the title of A. and B. and their families to property no part of this contingent account; and the court made the order. 13 Jur. 784.

Rogers v. *Price*, May 30, and June 6, 1849. *Lessor and lessee — Injunction — Waste.* A lease for years of land was granted, with power to lessee to dig for paving and tile stones, and a reservation to the lessor of timber, trees, saplings, and underwood, and the lessee covenanted to manage the demised premises in a husband-like manner. The lessee having permitted goats to run at large on the premises, the lessor filed his bill for an injunction, and obtained one on an interlocutory application. The lessee did not move to dissolve, and on the cause coming on for a hearing, the court made an order that the bill be retained for twelve months, with liberty to the lessor to bring an action; and if the same were not brought within that time, the bill to be dismissed with costs, not exceeding a stated sum. 13 Jur. 820.

Court of Queen's Bench. Sittings in Banco after Trinity Term.

Jenkins v. *Hutchinson*, July 15, 1849. A party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name as assent for that other, cannot be sued as a party to that instrument, unless it be shown that he was the real principal. 13 Jur. 763. [See *Polhull* v. *Walter*, (3 B. & Adol. 114); 2 Smith's Leading Cases, 222, and cases cited.]

Hilary Term.

Turrill v. *Crawby*, January 26, 1849. *Innkeeper — Sign.* Where a person brings a carriage to an hotel, at which he stops as a guest, the hotel keeper has a lien upon the carriage for its standing room and any labor bestowed on it. The innkeeper is not bound to inquire whether the carriage really belong to the guest, but if he received it *bonâ fide*, he may retain it against the real owner, however the guest may have obtained possession of it. Whether he has a lien for the whole bill incurred by his guest, *quære*. 13 Jur. 878.

Court of Common Pleas. Easter Term.

Fish v. *Kempton*, April 16. *Principal and Factor — Right of set-off.* If a buyer purchases goods of a factor, with the knowledge that he sells as factor, the buyer cannot set off a debt due to him from the factor in an action for the price of goods bought by the principal. 13 Jur. 751. [The case of *Warner* v. *McKay*, (1 Mee. & W. 591,) examined and explained.]

Sainter v. *Ferguson*, April 18, 1849. *Agreement — Consideration —*

Restraint of Trade — Penalty — Liquidated Damages. Assumpsit on a written agreement, whereby, in consideration that the plaintiff, a surgeon at M. would engage the defendant as his assistant, the defendant promised that he would not at any time practise at M., or within seven miles thereof, under a penalty of £500. *Held*, that the declaration disclosed a good consideration, and that the agreement was not void as being in restraint of trade. *Held also*, that the £500 was recoverable as liquidated damages. 13 Jur. 828.

Trinity Term.

Bayley v. *Wilkins*, May 28, 1849. *Money paid — Stockbroker — Calls on registered railway shares.* Defendant instructed plaintiff, a London stockbroker, to buy twenty shares in a registered railway company at 30*s.* discount. Plaintiff did so, and defendant paid him the amount of such purchase, but no transfer of the shares was executed and registered. Before the purchase, a call of £2 a share had been made, which the seller remaining the registered owner, paid after the purchase. Plaintiff was afterward required by the selling broker to repay the amount of such call, the rule of the London Stock Exchange authorizing the seller of registered shares to pay any call which may be made, and to claim the sum of her purchases. Plaintiff accordingly repaid the selling broker the amount of the call so paid. *Held*, that plaintiff was entitled to recover such amount from defendant as money paid to his use. 13 Jur. 832.

Court of Exchequer — Easter Term.

Norris v. *Serd*, May 1, 1849. *Lunacy — Pleading.* In an action by A. for assaulting and taking away against the will of the plaintiff, Elizabeth, the wife of the plaintiff, the defendant pleaded that he was proprietor of a licensed house for the cure of lunatics, and that said Elizabeth was delivered to his care as a lunatic, agreeably to the provisions of the act, — that she escaped and that he retook her. *Held*, that the plea was a sufficient defence, without averring that she was a lunatic. 13 Jur. 830.

Miscellaneous Intelligence.

Mr. Phillips and the Courvoisier Case. — Since we gave out the correspondence between Mr. Warren and Mr. Phillips, relative to this celebrated case, we have been gratified to notice that the English press gen-

erally speaks in terms of high commendation of the course of the latter gentleman. The following extract from the London Legal Observer deserves attention: —

"The imputation on Mr. Charles Phillips for improperly conducting the defence of Courvoisier on his trial for the murder of Lord William Russell has from time to time, during several years, been the subject of professional as well as public discussion, and we sincerely rejoice that Mr. Phillips, yielding to the friendly advice of Mr. Warren, has at length given a most satisfactory and complete refutation of every part of the charge against him.

"Our readers will have perused the letters of Mr. Warren and Mr. Phillips in the columns of *The Times* of the 20th instant. We have not space at present either to republish or abridge them; but a short notice is due to the importance of the subject. Three distinct charges are stated in this correspondence as having been made against Mr. Phillips: — 1st. For retaining the prisoner's brief after the murder was confessed. 2nd. For solemnly asserting his belief in the prisoner's innocence, and appeal to Heaven for his sincerity. 3rd. For attempting to throw the guilt upon other servants of the murdered nobleman.

"Now, 1st. it is clear, according to the long and invariable usage of the bar, and approved by the other branch of the profession, (who are the immediate legal agents of the accused,) that counsel must necessarily continue to hold their client's brief whether guilty or innocent. It is their duty to watch that the rules of evidence are strictly complied with; that every topic which the prisoner could himself address to the court and jury be urged, and that all objections in substance or in form are made on his behalf.

"2nd. It is ascertained, beyond all doubt, that Mr. Phillips, in the whole course of his eloquent speech, never once asserted his belief in the prisoner's innocence, nor made the needless appeal imputed to him. Moreover, all the reports of the trial in the daily newspapers, contained no such asseveration or appeal; and in addition to this, Mr. Phillips is enabled to refer to the high authority of Mr. Baron Parke, who was present at the trial, and entirely acquits Mr. Phillips of uttering any such statement.

"3rd. According also to all the reports in the daily newspapers, there is a distinct and emphatic expression by Mr. Phillips against any imputation of guilt on the other servants of the deceased. It is true, that on the day previous to the confession, and when Mr. Phillips believed in his first instructions, that Courvoisier was innocent, he cross-examined the witnesses with a view of casting the criminality from his client to some other person; but he was then ignorant of the truth, which was the next morning confessed, whilst the prisoner was in the dock, and in the presence of Mr. Clarkson, the other counsel for the defence.

"It may be regretted that Mr. Phillips, with such ample means of refutation, allowed the slander to take its course. We believe that the general impression was, that something to the effect, if not to the full extent, of the expressions imputed, had really been uttered, and that an excuse

could alone be found in the zeal of an eloquent advocate pleading for the life of his client. If Mr. Phillips was right in disdaining to answer the charge whilst he remained at the bar, Mr. Warren has forcibly urged that it was clearly his duty when elevated to a judicial position, to vindicate his conduct — for as a judge, he would be called upon to visit with censure, or punishment, those who deviated from the path of rectitude; and ill would such censures come from one who quietly submitted to reiterated accusations of speaking and acting a gross falsehood. It is gratifying to find that the character of the bar has thus been vindicated, and the public will now be satisfied that no such dangerous practice as that imputed to one of its members can ever be sanctioned by the bar.

Law-Making.—We have already furnished our readers with an abstract of the pamphlet recently published by Lord Brougham in the form of a letter addressed to Sir James Graham, "On the Making and Digesting of the Law." This letter furnishes, perhaps, a striking instance of the versatile talent and intellectual energy of the noble lord. It is also marked by some of his weaknesses; and these have induced an opponent of his project to prepare a most searching and successful examination of the "Letter" over the signature of "A Practical Man." These strictures apply chiefly to that part of his lordship's letter which relates to the consolidation or digesting of the bankrupt law; and it is shown that many of the errors which are most seriously criticized by Lord Brougham, originated in the bill which he takes to himself the credit of concocting, and which, according to his assumption, would seem to have been all but perfect.

Such exposures, unfortunately, destroy our confidence in the general good intentions of Lord Brougham's "letter missive," and give color to the rumor that the aggrandizement of certain individuals, no less than the probable public benefit, had stimulated his exertions. This is the more to be regretted, because every thing from so masterly a pen naturally arrests the public attention, producing a strong impression without, as well as within, the profession. But it is not our purpose to enter into a discussion of points possessing a merely local interest. We wish to call attention to another subject discussed in Lord Brougham's letter, which is worthy the attention of American as well as English lawyers.

We refer to the subject of "law-making," though, perhaps, this term is not the most accurate which could be selected. We wish to limit it to the act of preparing or drafting legislative acts. All will be glad that this subject has attracted the attention of so vigorous a mind; and "possibly," says the London Jurist, "some attention may now actually and really be paid to it."

The obscurity and confusion of the language of statutes, are familiar subjects of criticism and complaint, and furnish ample material for the popular clamor against our profession; the public assuming, with great readiness and injustice, that the drafting of laws, is as exclusively within the province of lawyers, as the execution of them is within that of the sheriffs. And the complaint is not unfrequently heard, that lawyers make the laws obscure in order to thrive by explaining them. We had supposed that in England, where political men are presumed to be trained to their

calling — constituting as they do a distinct profession — that some degree of perfection in this art of preparing laws had been arrived at. It is notorious, that none has been attained in the United States.

But, inasmuch as the magnitude of the evil is now admitted in both countries, let us briefly inquire into its causes and extent, and the practicability of remedying it; though we regret to say that it seems to be almost irremediable. A writer in the London Jurist traces the obscurity of acts of Parliament to two causes: firstly, the structure of legislative language; secondly, the parliamentary practice of altering detached parts of a bill without reference to the rest, and not subjecting the whole bill afterwards to the general consideration of any skilful and responsible person. The operation of the second cause enumerated by this writer will probably be admitted by our readers at once; but we do not think any genuine yankee can conceive of any dialect or language, which has been appropriated by law-makers. The honest countryman, who after one winter's experience in the great and general court, had learned to pronounce, without stammering, the terrific phrase, "An Act to repeal An Act in addition to An Act entitled An Act," had undoubtedly accomplished himself to the fullest extent in the lexicography and rhetoric of that elegant language quaintly called legislative.

We apprehend that the greatest mischief arises from this attempt to create a legislative "language." If legislators are intelligent, they will be able to express their meaning in current words, and with reasonable brevity. If they are not intelligent, we have no doubt that for a valuable consideration, they might find others who could draft intelligible laws; but whether such laws would reflect most strongly the wisdom of the legislators, or the draftsmen, we must leave to others to determine. We should be sorry to be compelled to assume that our legislators are unequal to their duties; yet the theory of drafting laws in "legislative language" by "accomplished draftsmen," necessarily pre-supposes such unfitness, and we might escape much of the expense of legislation, if, instead of choosing a legislature, we chose a draftsman or two, who knew the "language," and consequently could make the statutes intelligible. Such statutes, to be sure, might not exactly meet the public necessity, but then they would be intelligible, and lawyers could not thrive by explaining them. By such a contrivance, we might escape those two great evils, incompetent legislators, and expounders of statutes.

Sight Bills. — Judge Strawbridge of the fourth district court of New Orleans has decided, that evidence was admissible tending to show a custom of merchants in the city of New York, according to which grace was *not* allowed on sight bills. A synopsis of his opinion appears in the Picayune, which we give below: —

The question mainly debated in this case is, whether a bill of exchange at sight is payable on presentation or entitled to grace?

On the abstract question, as part of the common law, I have not now, nor have I for thirty years had the least doubt. Chitty, in his treatise on Bills, page 409, speaks of a difference in decisions and treatises on the subject, but concludes that "it is now settled that the days of grace are

allowed." Judge Kent, in his Commentaries, vol. 3, page 100, uses similar expressions, but qualifies this as "the better opinion." Neither of them refer to any decision, nor has the research of any one engaged in this case found one which sustains the position of the defendant. The treatises referred to are those of Chitty and Bailey, who admit the days of grace, and Kid and Beawes, who deny them, without citing any authority: and the foreign writers, Pothier and Jousse. Of these latter it may be remarked, that notwithstanding the very great weight due to the opinion of Pothier, the reason given by him, namely, "the inconvenience a traveller might sustain by waiting whilst the days of grace are running," is insufficient to show that such is the law. The inconvenience might easily be avoided by taking a draft at sight without grace, (which by the way, though well known amongst merchants, would be a very useless and incongruous act, if all drafts at sight were payable on presentation) or a draft on demand, or the more common device almost universal in this country of a bank check. Be the opinion of these civil law writers correct or not, it cannot establish such to be the law merchant in the city of New York. If we were at liberty to examine into the reason of the thing, it would seem much stronger in favor of a sight draft than of one at sixty days or six months, where all reason fails.

The plaintiff, however, relies on the usage of New York, and under a commission issued from this court he has produced a mass of proof almost overwhelming. Some opposing testimony has also been taken. If, as has been asserted, more such could have been produced, it is the error of the defendant not to have done so. The court cannot hesitate, under the great preponderancy of testimony, in which merchants, lawyers, brokers, and notaries almost unanimously concur. It has, however, not been introduced without opposition, and very high authority *pro* and *con* has been laid before the court to establish or impeach the rule that "where the law is clear proof of custom cannot be received to vary it." I concur in the opinion of Judge Story, in 2d Sumner's Reports, 377, "the usages amongst merchants are to be sparingly adopted, as being often founded in mere mistake," and it may be added, on crude opinions of the laws, and not from the knowledge and experience of numerous cases and facts; but he never asserted that they were to be disregarded. Perhaps these conflicting opinions might be reconciled by close examination; perhaps some of these were cases of positive legislation and fixed rule, which certainly cannot be varied by usage, whilst others were cases of commercial laws almost wholly dependent on the usage of merchants, in which cases it would be difficult to assign any good reason why a system based on custom should not be changed in the same manner. Indeed, in a case referred to by Chitty, Judge Buller mentioned a case before Justice Willes in London, where it was left to a jury of merchants, who decided (of course under the custom) that days of grace were allowed on sight bills. No one would think of offering proof that, by the custom of the city of New York, the right of primogeniture existed there. Nor would any one, I think, deny the right to show by proof that it was the usage there to pay notes in bank before three o'clock, or they would be subject to protest.

The treatises on insurance present numerous instances where the con-

struction of a policy here is different from that adopted in England, and like differences exist in different states, all arising out of usage.

It is not, however, necessary, in this case, to reconcile these differences. The case of *Renner* v. *The Bank of Columbia* (9 Wheaton, 58,) appears to the court decisive of the present. The bill there sued on had not been protested until the fourth day after that of payment, and by the general law merchant the liability of the endorser was gone. This was, however, shown to be in conformity with the usage of the banks in the district, and, on the showing, the plaintiff had judgment. If, then, the custom of any community can vary the law by adding a fourth day of grace, it can abridge them a day or dispense with them altogether. Here the proof does establish that for forty years and longer than any witness produced can remember, the usage in the city of New York has been to pay sight drafts on presentment, or protest followed.

It has not escaped the notice of the Court that the testimony given in Renner's case was not excepted to; and 2dly, that some of Judge Thompson's expressions appear to lay stress on the fact of defendant's having before dealt with the bank and knew their mode of business. But leaving these out of view, the broad principles laid down and on which the case was decided cover all that is in contest here. Judgment is therefore rendered for the plaintiff, with damages and costs.

J. Livingston for plaintiff; Kendall and Howard for defendants.

Remuneration of the Profession. — In undertaking the discussion of this subject,[1] we revert to the last number of the *Law Review*. "Of all the topics which claim the attention of the law reformer, that of *remuneration*" (says the reviewer,) is the most difficult, and looking at its effects on other matters, most important. It is a mere truism to say, that, if men work, they must also eat; that work cannot be done without agents and instruments; and that both must be created, trained, and maintained. The public must pay for its whistle. If they would have good laws, they must provide the means of making good laws; or, if they prefer the pleasure of litigation on the doubts to which bad laws must give rise, they can have their indulgence only upon the terms of maintaining courts and judges, and their officers, advocates, attorneys, and an array of legal agents of all grades. If, moreover, they would avoid those feuds and quarrels which, even under the best laws, will take place, and yet prefer present ease and comfort to the sober duty of transacting their own affairs in a business-like manner, they must also pay for this luxury. In this world of work, no good thing comes without exertion continually and systematically applied, and somehow or other paid for."

The writer then proceeds to notice the bitter complaints which have been made of the court of chancery, as indeed he might have said of all courts, by those who neglecting their affairs, at the proper season, dislike to pay the expense of adjusting differences which ought never to have arisen. Our countrymen have, in general, a very strong sense of justice,

[1] See pp. 261, 348, for recent articles on the same topic.

and some of our most economical reformers would willingly be very *liberal* in securing the due administration of justice; but it will scarcely be denied that the public lose sight of the advantage which results from settling questions of litigation "once and for ever." Hard it is, we admit, that the individual suitor should incur the expense of expounding doubtful and uncertain laws. The state ought in duty to defray the cost of judges, masters, registrars, clerks, and all official expenses; — leaving the unfortunate suitor to pay only his counsel, attorney, and witnesses, — a sufficient guarantee against needless litigation. This disbursement, indeed, he will have almost always to defray, for though he has the *right* to conduct his own actions and suits without counsel or attorney, it is not only at all times difficult, and sometimes impossible, to do justice to his own case; but for the most part his private affairs will not permit him to bestow the time required for preparing and conducting a cause from the beginning to the end. It is obvious also, that if the parties were their own lawyers, the facts would not be duly investigated, the legal inferences would not be properly brought out, nor, consequently, could a just conclusion be drawn which might serve as a guide for similar cases.

It is, indeed, manifest, that lawyers are a necessary good or evil, and that it is impossible for laws to be executed without them. Even in the county courts, in matters of a few pounds value, where the question is not merely *when* the money shall be paid, but *how much* if any, it will be found impracticable to proceed satisfactorily without legal assistance, and a class of practitioners in these courts will at no distant time be formed, — whether for the benefit of the public, or the credit of the profession, will depend considerably on the amount of their remuneration. Without meaning to say that small emoluments will produce pettifoggers, or that a poor attorney must be dishonest, we think the amount of skill, learning, and respectability which will be enlisted in that department of practice, will bear at least a general proportion to the honor and reward which may be conferred upon its practitioners.

Except in the instances in which a practitioner has the good fortune to obtain a considerable number of clients, he will never, we believe, be sufficiently remunerated. "The suitor" (as the law reviewer says) "cannot be expected, in estimating the cost of defending his freehold, to value so much, or of recovering a debt of such an amount, to bear in mind how many years were expended (if haply they were expended) in poring over law books, in attending court and assizes, in hope, not brief but briefless, of the future, — expended in a costly education at school and at college, in hall, and in the waiting at court, and which must be included, to a greater or less extent, in the reckoning, — if on the present footing we would have able and intelligent legal agents."

This summing up of the cost of legal education applies for the most part to the barrister. The outlay is not a whit the less in the case of the attorney. His education, short of going to college (though many now do so) is not, or ought not to be, less than that of the barrister. His stamp duties and premium are of larger amount and his clerkship for as long a time. The preparation for admission stricter. The expenses of his professional establishment much larger; his capital more extensive; and on

the whole, therefore, his risks are quite as great both in the expenditure of time and money. These and other matters are not duly estimated by the public in considering the charges of the attorney. They look at the sum total, including fees of judges, officers, and counsel, and conclude that much more falls to the share of the attorney than he ever receives, without regard to his losses or the interest on his advances.

We have thus glanced at some of the topics, involved in the important subject of professional remuneration. As many sources of emolument have been wholly withdrawn, or largely diminished by the operation of recent changes in the law, it becomes a serious question whether some compensation should not be afforded by a new or different mode of charge. There are two alterations which might justly be made: 1st. The attorney who advances the money for the fees and disbursements in the progress of a cause, should be entitled to interest thereon. In some instances, we know that the interest would equal the professional charges. 2nd. In certain classes of cases he should be entitled to charge a per centage on the value of the property recovered or defended. This is not without precedent in some respects, as in mortgage and annuity transactions, in which an *ad valorem* procuration fee is afforded.

These hints are offered for consideration during the present leisure season of the legal year, and we shall be glad to hear the sentiments of our correspondents both in the country and in town. — *London Legal Observer.*

The Profession of the Law. — The death of the late Charles Chauncy, long one of the most eminent members of the Philadelphia bar, was made the occasion of a sermon, by the Rev. Henry A. Boardman, D. D., on the duties of the legal profession, and on the importance of christianity to its members. The address was at once so eloquent, and so just, that a large number of the most distinguished practitioners directed a letter to the orator, soliciting its publication; and accordingly it has been issued under the auspices of Judge Grier, the Hon. Joseph R. Ingersoll, and others. The passage, in which he draws a picture of what the bar should be, is so well expressed that we quote it: —

"The moral character of the bar, no less than its character for learning and ability, is a matter of deep and universal concern. It is not a matter, gentlemen of the bar, which pertains merely to your reputation as individuals, nor to relations between yourselves and clients. Even if it were, it might be pertinent to ask, who are your clients? For the purpose of this argument, the whole community are your clients. There is no citizen, however humble or however exalted, who may not at any time become your client. There is not one among our honorable and opulent merchants, among the ministers of religion, among the able and upright jurists who preside over your own courts — nay, not one among those refined and gentle females, our mothers, wives, and daughters, who make our homes the purest and the happiest homes on earth, who may not, on any day, be compelled to invoke your protection. You are the conservators of our property, of our liberty, our lives, our character; the guardians of our firesides, the defenders of our altars. Have we no stake, then, in your character? Have we no right to insist that a profession which is the

depository of our most sacred earthly interests, shall omit nothing that may help to qualify them for their high trusts? — that they shall not only make themselves masters of their noble science in its principles and its technicalities, but cultivate those elevated moral sentiments which alone can assure us that our confidence will not be misplaced.

"Let us look at the profession in another aspect. The bar must always, in a country like ours, be the chief avenue of distinction — the main road to posts of emolument and power. As such, it will embrace a large proportion of the educated and able men of the Union; and the influence of such a body must necessarily be very great, irrespective of their strictly professional functions. How much, then, must this influence be augmented, when it is considered they exert an immediate and powerful agency in moulding the popular will. They are usually the leaders in the collisions of parties and the chief speakers even in the primary assemblies of the people. They fill the principal offices. They direct our legislation, and make the laws which it devolves upon them to administer. They shape our policy, domestic and foreign. They control our intercourse with other countries; and do more than any other class amongst us to decide the relative position we are to occupy among the nations of the earth. Not to expatiate on these topics, the bare hint of them must suffice to show, that every citizen is implicated in the character of the bar; and that a profession clothed with so lofty a mission needs, both for its own sake and for the sake of the country, to be pervaded with a wholesome religious sentiment. Piety, alone, will not, it is true, fit men to become jurists, diplomatists, or legislators. But piety is the basis of good morals. It makes men conscientious. It stimulates them to acquire the qualifications demanded by the stations Providence may assign them, and puts them upon using their abilities for the best ends. If evangelical christianity were enthroned, not in our halls of justice merely, but in the hearts of all who serve at her altars, their great influence would tell, if the expression may be pardoned, far more auspiciously than it does now, upon the leading interests of the country. It would moderate the spirit of faction — the bane of all republics. It might repress the idolatry of mammon, and curb the lust of conquest — two of the brood of baser passions which have acquired an herculean growth in our soil. It would check the prevailing tendency to rash and hasty legislation, and teach visionary reformers that they 'should approach to the faults of the state as to the wounds of a father, with pious awe and trembling solicitude.' It would be felt through all the frame-work of society, and extinguishing vice, alleviating misery, fostering education, and consolidating the institutions of christianity."

Pecuniary Liability of Insane Persons for Torts. We take the following from quite an old number of the Albany Evening Journal, but we do not remember to have seen it published elsewhere. The point is somewhat novel: —

"*Circuit Court — Judge Parker presiding.* Tuesday morning the case of *John C. Mull*, executor of James C. Mull, deceased, v. *Thomas Kelly*, was brought on. This is a cause of great interest, in which several

important legal questions are involved. It is brought to recover damages for causing the death of James C. Mull. It will be recollected that about a year ago the defendant was found on Sunday insane, and at large in the streets of this city, flourishing a loaded pistol and a bowie knife, to the great danger of persons in the streets. The deceased and others attempted to arrest and secure the defendant, when the defendant fired a pistol at deceased and then stabbed him with a bowie knife. The latter wound caused his death.

The suit was brought by the executor, under the statute of 1847, to recover damages for the benefit of the widow and child of the deceased. On securing Kelly there were found on his person drafts and treasury notes and money, to the amount, in all, of nearly ten thousand dollars. The judge decided that this fact was not admissible in evidence, but it was afterwards proved by consent of counsel. The defendant is now in the lunatic asylum at Utica.

The jury were very eloquently addressed by Mr. J. K. Porter for the defendant, and Mr. H. G. Wheaton for the plaintiff.

Judge Parker charged, that if the conduct of the defendant (he being a madman) was such, when at large, as to endanger the safety of persons about him in the streets, it was the right of Mull and others to secure him, and that they were authorized to use as much force as was necessary for that purpose. And that if in doing so, by proper means, the defendant inflicted the wounds that caused Mull's death, the defendant was *civilly* liable for the damage caused, though he could not be responsible *criminally* for the act, in consequence of his insanity. This law had long been settled, and was conceded by the defendant's counsel. It was upon the ground that the loss sustained ought to fall upon the persons causing it.

If a lunatic took the money or property of another person he was liable to make the injury good by way of damages in a civil suit. The rule was the same, whether the injury was to the person or property of another. But when such a suit was brought to obtain indemnity, nothing could be added to the damages by way of fine or punishment, for the lunatic was incapable of intending wrong. He was not responsible for any wrong intention and could not be punished, under indictment or otherwise, for any injury he might commit. And if the jury thought the act complained of was committed under such circumstances as to make the defendant liable, they would give by way of damages only the actual loss sustained.

The jury returned a verdict of $2,800.

Rights of Insane Persons. — The controversy on this subject is to be renewed before the English court of Exchequer. We observe in the calendar of that court, the following note: —

Nottidge *v.* Ripley and another.

Alleged lunatic — Maintenance and medical treatment — Set off as necessaries. Quære, whether defendants, who had advanced moneys for the maintenance and medical treatment of the plaintiff in a lunatic asylum, who, however, had been held not a lunatic, can set off such payments in an action for money had and received for the plaintiff's use?

Quære, also, whether such maintenance and medical treatment can under the circumstances be considered as necessaries.

This action was brought to recover the amount of the dividends belonging to the plaintiff as money had and received to her use during her confinement in a private lunatic asylum. The defendants claimed to set off against this demand the expenses incurred on the plaintiff's behalf, for necessaries supplied to her. A verdict having been taken by consent for the plaintiff, with leave, however, to the defendants to move to enter it for themselves, if the court should hold that the right of setting off such expenses accrued to them under the circumstances, the present motion was made.

Sir F. Thesiger, in support of the motion, contended, that the plaintiff had been placed by her relatives in Dr. Stillwell's private asylum, under the authority of medical certificates, and that maintenance and medical treatment were necessaries to a lunatic, and might as such be set off against the income; citing *Howard* v. *Lord Digby*, (2 C. & F. 634); *Peters* v. *Grote*, (7 Sim. 238); *Wentworth* v. *Tubb*, (1 Y. & C., Ch., 171); *Williams* v. *Wentworth*, (5 Beav. 325); *Nelson* v. *Duncombe*, (9 Beav. 211.)

The *court* granted a rule *nisi*.

The consideration of this case will raise some new and highly interesting points of law.

Notices of New Books.

Pennsylvania State Reports, containing Cases adjudged in the Supreme Court, during part of December Term, 1848, and March Term, and part of May Term, 1849. Vol. X. By Robert M. Barr, State Reporter. Philadelphia: T. & J. W. Johnson, Law Booksellers and Publishers, 1849.

The period of time included by the present volume of reports, is indicated by its title, and we can fully say that it is entitled to all the commendation which has hitherto been bestowed on the legal bibliography of the second state of the Union.

Our opportunity for examining the present volume has not been such as enables us to criticize individual cases. In a cursory examination, several have attracted our notice. Among these, we would mention the case of *Beals* v. *Lee*, p. 57, where the question of insanity, and its operation upon contracts was considered. It was held, that if the contract were *executed* before a public verdict of insanity by the inquest, the contract cannot be avoided upon proof of the insanity, unless there shall appear to have been

actual fraud, or that the vendor *knew* the condition of the vendee. In *Scott* v. *Greer*, it was held, that proof of a waiver of protest, by an endorser, on the day of maturity, was proof of demand and refusal. (See *contra*, *Berkshire Bank* v. *Jones*, 6 Mass. 524.) In *Myers* v. *Baymore*, the question of a master's right to sell his ship at a port of necessity, is discussed at considerable length, and the general right of the master denied. In *Snyder* v. *Wise*, p. 157, it is held that a judgment before a justice of the peace, is not within the act of congress, directing the mode of authentication of the words and judicial proceedings of the courts of the several states. The authorities are very carefully collated in this case by COULTER, J. In *Traley* v. *Bispham*, p. 320, there is a very nice and subtle decision upon the doctrine of implied warranty, which, to say the least, hardly agrees with the case of *Henshaw et al.* v. *Robins*, (9 Metc. 83.) The case of *Hillyard* v. *Miller*, p. 327, appears in the present number of the Reporter. The case of *Commonwealth* v. *Stauffir*, p. 350, has been frequently referred to in the newspapers, and we should like to have seen an accurate report before. It was in this case that conditions in restraint of marriage were held valid in devises of real estate to widows.

THE LIVES OF THE CHIEF JUSTICES OF ENGLAND. From the Norman Conquest, till the death of Lord Mansfield. By JOHN LORD CAMPBELL, LL. D., F. R. S E., Author of "The Lives of the Lord Chancellors of England." In two volumes. Vol. II. London: John Murray, Albemarle Street, 1849.

Lord Campbell has been seized with a biographical mania which has been rarely equalled. From the woolsack, he has turned to the king's bench, which, like the chancery, is venerable for its antiquity as well as for the eminent virtues and learning of those who have enjoyed its honors.

We think the present work will be more interesting to the profession than the "Lives of the Chancellors." The office of chancellor is semi-political; that of chief justice, is eminently and purely judicial; although it is unquestionably true that many who have adorned that bench have served their state with honor, in each house of parliament. Like the "Lives of the Chancellors," the present volumes contain much valuable research. The history of the king's bench, is traced back to dim antiquity, even to the days of ODO, the first chief justiciar, who accompanied the Norman conqueror in his invasion of England. Of the many who since that time have been placed at the head of the common law of England, we forbear to speak. The learned Bracton, the infamous Hengham, the treacherous Tresilian, the independent Gascoigne, the immortal Coke, the pure and upright Hale, the miserable Scroggs, the vulgar Saunders, the execrable Jeffries, the strong-minded Holt, and, last of all, that chief justice, who is recognized everywhere as the embodiment of all the judicial glory of England — Lord Mansfield — all here sketched with the pen of a master.

A CATALOGUE OF THE SOCIAL LAW LIBRARY IN BOSTON. Second edition. Boston: Printed for the proprietors, 1849.

CATALOGUE OF THE LAW BOOKS IN THE NEW YORK STATE LIBRARY, under the divisions of I. Law. II. Statute Law. III. State Papers. December, 1849.

We publish above the titles of two Catalogues which have appeared during the year which has just passed. They are the keys to two of the finest Law Libraries in the country, and are prepared with great fidelity.

THE CONTRACT OF ENDORSEMENT, WITH NOTES AND REFERENCES; TO WHICH IS ADDED A PRACTICAL FORM FOR A NOTICE OF DISHONOR FROM CHITTY. By "LEGES." Auburn: Derby, Miller & Co. 1849.

We do not fancy anonymous books. Much less do we relish the taste of the author of the present treatise in selecting his "*nom de guerre.*" Nevertheless, we must not deny the merits of the work, which are considerable. It consists of a series of articles originally published in the New York Legal Observer. They are based upon the opinion of JEWETT, C. J. in the court of appeals, in the case of *Warden et al.* v. *Cayuga County Bank*, (1 Comstock, R. 413.)

A SELECTION OF LEADING CASES IN EQUITY, WITH NOTES. BY FREDERIC THOMAS WHITE, AND OWEN DAVIES TUDOR, of the Middle Temple, Esqrs., Barristers at Law. With additional Annotations, containing References to American Cases, by JOHN INNIS CLARK HARE, and HORACE BINNEY WALLACE. Philadelphia: T. & J. W. Johnson, Law Booksellers, Publishers, and Importers, 197 Chestnut street, 1849.

Messrs. Hare & Wallace, are already favorably known to the legal profession of this country, by their valuable edition of Smith's Leading Cases. The present edition of equity cases has received equal attention from Mr. Wallace, who has had the principal charge of preparing it.

Of the English edition, we have nothing to say except in its favor. The selection of cases, (there are thirty-one of them,) has been made with care and judgment. The subjects discussed, are: *Executed and Executory Trusts; Renewal of Lease by a Trustee; Liability of a purchaser as in the application of his purchase money; Contribution between co-sureties; Purchase by a Trustee; Joint Purchases; Purchase in the name of a Son; Defective execution of power; Voluntary trusts; Vendor's lien for purchase money; Election; Frauds on marital rights; Wife's equity to a settlement; Wife's separate property; Post obit securities; Confirmation; Liability of personal estate for payment of debts; Exoneration; Equitable mortgage by deposit of title deeds; Equitable waste; Part performance of parol contract respecting land; Specific performance of agreements relating to personal property; Conversion; Resulting trust on failure of the purposes for which conversion has been directed; Donatio mortis causâ.*"

Of a portion of these cases, more especially those which are affected by our registration laws, Mr. Wallace well remarks, that the different policy of this country has diminished their importance. And some other subjects, such as the purchase of reversionary and contingent interests, illustrated by the prominent case of *Chesterfield* v. *Janssen*, are of little importance here, on account of the rarity of settlements giving rise to such interests. But notwithstanding a few such cases, the work will be found of great practical value to every American solicitor.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, Samuel E.	Lynn,	Nov. 15,	John G. King.
Adams, Henry	Worcester,	" 3,	Henry Chapin.
Allen, John Perry	Manchester,	" 28,	John G. King.
Austin, George M.	Easton,	" 3,	David Perkins.
Bailey, Waterman	Scituate,	" 13,	Welcome Young.
Billman, John	Boston,	" 13,	J. M. Williams.
Bradshaw, Samuel C. Jr.	Somerville,	" 14,	Asa F. Lawrence.
Brown, Moses A.	Reading,	" 29,	Asa F. Lawrence.
Carlton, Silas G.	Millbury,	" 26,	Henry Chapin.
Creech, Samuel W.	Boston,	" 19,	J. M. Williams.
Dearborn, Allison, et al.	Quincy,	" 13,	J. M. Williams.
De Fontaine, Antonio	Lowell,	" 6,	Asa F. Lawrence.
Ellis, Avery P.	Boston,	" 24,	J. M. Williams.
Foster, Isaac	Boston,	" 14,	J. M. Williams.
Fuller, Enoch P., et al.	Salem,	" 23,	John G. King.
Gregg, Alexander	Watertown,	" 24,	Asa F. Lawrence.
Griffin, Walter	Bradford,	" 27,	John G. King.
Haley, William P.	Roxbury,	" 14,	Francis Hilliard.
Harwood, Roderick B.	Whately,	" 10,	D. W. Alvord.
Hemminway, Otis	Leverett,	" 12,	D. W. Alvord.
Hemminway, Eliphalet	Leverett,	" 12,	D. W. Alvord.
Hill, Freedom, et al.	Boston,	" 6,	J. M. Williams.
Hosmer, Lot L.	Boylston,	" 24,	Henry Chapin.
Hoogs, John B.	Needham,	" 7,	Francis Hilliard.
Ingalls, James M.	Brookline,	" 22,	Francis Hilliard.
Ives, Asahel B.	Tyringham,	" 23,	Thomas Robinson.
Knight, Alonzo	Springfield,	" 14,	George B. Morris.
Mann, Daniel	Sterling,	" 24,	Henry Chapin.
McJanet, Samuel	Rockport,	" 28,	John G. King.
Packer, Humphrey T.	Gloucester,	" 8,	John G. King.
Pailhes, Rebecca A.	Boston,	" 21,	J. M. Williams.
Patterson, William, et al.	Boston,	" 6,	J. M. Williams.
Phelps, James G. et al.	Salem,	" 23,	John G. King.
Poole, Charles	Newburyport,	" 7,	John G. King.
Pratt, Parmenas & Enoch	Lawrence,	" 23,	John G. King.
Ryder, Charles C. et al.	Roxbury,	" 2,	J. M. Williams.
Sawtelle, Charles	Bernardston,	" 28,	D. W. Alvord,
Seabury, John W.	Taunton,	" 9,	David Perkins.
Stone, Napoleon B.	Ashland,	" 27,	Asa F. Lawrence.
Ware, Thomas J.	Wayland,	" 8,	Asa F. Lawrence.
Weston, Moses	Deerfield,	" 1,	D. W. Alvord,
Winch, Isaiah, et al.	Boston,	" 6,	J. M. Williams.